Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHARLES H. BEHLEN *et al.*,

Petitioner,

v.

MERRILL LYNCH & CO., INC., and
PHOENIX INVESTMENT PARTNERS, LTD. *et al.*,

Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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84 pp

QUESTIONS PRESENTED

The federal securities laws contain no general bar against various private suits based on state common law in state court. Furthermore, 15 U.S.C. § 77v provides for concurrent jurisdiction and a bar to removal from state court to federal court of federal securities-law claims arising under the Securities Act of 1933, except as provided in the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). SLUSA declares that "class actions" asserting state-law claims based on untrue statements in connection with the purchase of securities may not "be maintained." In this case, the Eleventh Circuit found that a district court possessed removal jurisdiction over a state-law action filed originally in state court, though there had been no determination that the action was due to be maintained as a class action. The Eleventh Circuit also found that the district court properly dismissed, with prejudice, claims of class-wide wrongdoing, even after deletion of fraud claims and any references to untrue statements in the complaint.

1. Does the requirement of SLUSA, codified in 15 U.S.C. § 77p(b), that "no covered class action . . . may be maintained" authorize dismissal, with prejudice, of an entire complaint, including not only state-law claims of class-wide untrue statements in connection with the purchase of securities, but also state-law claims of class-wide misconduct for breach of contract or negligence for service charges imposed during the period of ownership?

2. Does the portion of SLUSA, codified in 15 U.S.C. § 77p(b), which provides that "no covered class action based upon the statutory or common law of any State . . . may be maintained in any state or federal court . . . ," supply a basis for removal to federal district court, as provided in 28 U.S.C.

§ 1441, of an action whose only filing – a complaint – merely alleges untrue statements against a class of persons in connection with the purchase of a security?

LIST OF PARTIES

Petitioner Charles H. Behlen is the Plaintiff suing on behalf of himself and on behalf of a class of persons similarly situated in an action originally filed in the Circuit Court of Mobile County, Alabama, and removed by the Defendants to the United States District Court for the Southern District of Alabama. He was the Appellant in the United States Court of Appeals for the Eleventh Circuit.

Respondent Merrill Lynch & Co., Inc. is a Defendant in the action filed by Behlen and was an Appellee in the United States Court of Appeals for the Eleventh Circuit.

Respondent Phoenix Investment Partners, Ltd. is a Defendant in the action filed by Behlen and was an Appellee in the United States Court of Appeals for the Eleventh Circuit.

TABLE OF CONTENTS

Questions Presented i

List of Parties iii

Table of Authorities vii

Petition for Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Statutory and Regulatory Provisions Involved 2

Statement of the Case 4

A. Factual Background and Proceedings in the District Court. 4

B. The Eleventh Circuit's Opinion. 7

Reasons for Granting the Writ 8

I. Dismissal of the Claims That Do Not Require Consideration of Misrepresentations in Connection with the Purchase or Sale of a Security Is Unjustified and Is in Conflict with a Recent Ninth Circuit Decision. 8

II. The Eleventh Circuit's Holding That SLUSA Authorizes Removal in Accordance with the Doctrine of Complete Preemption Is Erroneous and Conflicts with a Recent Decision of This Court. 10

Conclusion 14

Appendix:

Appendix A
Behlen v. Merrill Lynch,
311 F.3d 1087 (11th Cir. 2002) A1

Appendix B
Eleventh Circuit's order denying petition for rehearing and petition for rehearing en banc in *Behlen v. Merrill Lynch & Co. et al.* A18

Appendix C
Memorandum Opinion and Order of the U.S. District Court for the Southern District of Alabama in *Behlen v. Merrill Lynch & Co. et al.* A20

Appendix D
Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 ("SLUSA") A29

Appendix E
15 U.S.C. § 77p A49

Appendix F
15 U.S.C. § 1441 ..... A54

Appendix G
Aaron Lucchetti, *Prudential Limits Brokers' B-Share Sales*, Wall St. J., July 17, 2001, at C23 ..... A56

Appendix H
Floyd Norris, *Most Fund Brokers in Study Failed to Give Full Discounts*, N.Y. Times, March 12, 2003, at C17 ..... A59

TABLE OF AUTHORITIES

Cases **Page**

Behlen v. Merrill Lynch & Co.,
311 F.3d 1087 (11th Cir. 2002) 1, 7-9, 11, 12

Breuer v. Jim's Concrete of Brevard,
123 S. Ct. 816 (2003) 11

Breuer v. Jim's Concrete of Brevard, Inc.,
292 F.3d 1308 (11th Cir. 2002) 11

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 10

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 13

Falkowski v. Imation Corp.,
309 F.3d 1123 (9th Cir. 2002) 8

General Tel. Co. v. Falcon,
457 U.S. 147 (1982) 12

Green v. Ameritrade,
279 F.3d 590 (8th Cir. 2002) 8

Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826,
122 S. Ct. 1889 (2002) 13, 14

Matsushita Elec. Indus. Co. v. Epstein,
516 U.S. 367 (1996) 13

Riley v. Merrill Lynch,
292 F.3d 1334 (11th Cir.), *cert. denied*,
123 S. Ct. 395 (2002) 12

Santa Fe Indus., Inc. v. Green,
430 U.S. 462 (1977) 13

Syngenta Crop Protection, Inc. v. Henson,
123 S. Ct. 366 (2002) 10

Statutes and Rules **Page**

The Securities Litigation Uniform Standards
Act of 1998, Pub. L. No. 105-353,
112 Stat. 3227 ("SLUSA") ..... *passim*

15 U.S.C. § 77p 2

15 U.S.C. § 77p(b) ..... i, 3, 7, 10

15 U.S.C. § 77p(c) 7, 11

15 U.S.C. § 77v ..... i, 3, 4, 11, 12

15 U.S.C. § 78aa 13

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 13

28 U.S.C. § 1367 ..... 8, 9

28 U.S.C. § 1441 ..... i, 4, 10-12

28 U.S.C. § 1738 13

Rule 23, Fed. R. Civ. P 12

PETITION FOR WRIT OF CERTIORARI

Charles H. Behlen respectfully petitions this Court to issue a writ of certiorari to review the November 8, 2002, judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears in the Appendix to the Petition at Appendix A, page A1. It is published in the Federal Reporter (third series) at page 1087 of volume 311, and is cited as *Behlen v. Merrill Lynch & Co.*, 311 F.3d 1087 (11th Cir. 2002). The Eleventh Circuit denied an application for rehearing on January 13, 2003, and a copy of that order appears at Appendix B, page A18. The decision of the United States District Court for the Southern District of Alabama is unpublished and is reproduced in Appendix C, page A20.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its decision affirming the trial court's judgment on November 8, 2002. (App. A.) Petitioner Behlen filed an application for rehearing en banc, and that application was denied on January 13, 2003. (App. B.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case concerns the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 ("SLUSA"). SLUSA is set out in full in Appendix D.

The complete text of 15 U.S.C. § 77p is set forth in Appendix E. Subdivisions (b) and (c) of 15 U.S.C. § 77p provide as follows:

> (b) Class action limitations
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> > (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
> >
> > (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.
>
> (c) Removal of covered class actions
>
> Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of

> this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section.

15 U.S.C. § 77p(b) & (c).

Subdivision (a) of 15 U.S.C. § 77v provides as follows:

> (a) Federal and State courts; venue; service of process; review; removal; costs
>
> The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject

> to review as provided in sections 1254, 1291, 1292, and 1294 of title 28. Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

15 U.S.C. § 77v(a).

The complete text of 28 U.S.C. § 1441 is set forth in Appendix F.

STATEMENT OF THE CASE

A. Factual Background and Proceedings in the District Court.

From November 1999 to March 2000, Charles Behlen purchased shares in a mutual fund known as the Phoenix-Engemann Aggressive Growth Fund. Behlen purchased the shares from Merrill Lynch & Co. and Phoenix Investment Partners, Ltd. (the "Defendants"). The shares are divided into classes or categories in light of when the sales charge is paid and which, if any, service charges are applicable. Other than service charges and fees, there is no difference between "Class A" and "Class B" shares, which are merely categories for the designation of charges and fees. The underlying securities owned by persons holding "shares" or

interests in the fund, whether "Class A" or "Class B," are the same.

"Class A" shares incur a sales charge when they are purchased, and the sales charge is reduced according to the amount invested at specified intervals and eliminated completely on an individual or aggregated investment of $1,000,000 or more. The sales charges one "may pay" on "Class A" shares are 4.75% for transactions under $50,000; 4.5% for transactions under $100,000; 3.5% for transactions under $250,000; 3% for transactions under $500,000; 2% for transactions under $1,000,000; and no charge for transactions of $1,000,000 or more. "Class B" shares do not incur a sales charge when purchased, but they are subject to a sales charge if redeemed within five years of purchase. There is no reduction in sales charges for "Class B" like there is for "Class A." Also, "Class B" shares are subject to an ongoing distribution and services fee at an aggregate annual rate of up to 1% of the fund's aggregate average daily net assets attributable to the "Class B" shares. "Class A" shares are subject to only a 0.25% distribution and services fee. The net effect of the way these charges and fees are imposed is that persons owning shares purchased for more than $100,000 in the fund are adversely affected economically by "Class B" status in comparison to "Class A" status.[1]

On March 15, 2001, Behlen filed a civil action in state court seeking to recover money damages resulting from his purchase of those shares. In his original complaint, which was styled as a class action, Behlen asserted various state-law claims, including claims for breach of contract, breach

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[1] Informative discussions of multiple classes of shares in mutual funds and the conflicts of interest that arise can be found in a July 2001 *Wall Street Journal* article, which is reproduced at Appendix G, and a March 2003 *New York Times* article, which is reproduced at Appendix H.

of implied covenants and duties, breach of fiduciary duty, unjust enrichment, suppression, misrepresentation, and negligence and/or wantonness. He alleged that the Defendants sold him and the class members Class B shares in the growth fund when they were unknowingly eligible to purchase Class A shares. He further alleged that the Defendants sold them the wrong shares, because the Class B shares were subject to higher fees and commissions than the Class A shares. Specifically, Behlen alleged, among other things, that:

- "Plaintiff and the Class were eligible for reduced charges, fees, and/or commissions available on Class A shares,"

- "Class A shares allow for reduced fees, charges, expenses and/or commissions by Defendant,"

- "Defendants wrongfully failed to set-up, maintain and/or apply appropriate and necessary compliance procedures, administration, and/or supervision to prevent the overcharging of fees and charges to Plaintiff and the Class," and

- "Defendants failed to properly account to Plaintiff and the Class" and "lacked the proper compliance mechanisms and procedures."

On April 27, 2001, the Defendants removed the lawsuit from state court to the United States District Court for the Southern District of Alabama, asserting that the district court had subject-matter jurisdiction over the case pursuant to SLUSA. Three days later, the Defendants filed a motion to dismiss Behlen's complaint. Behlen subsequently filed an amended complaint, in which he asserted the same state-

law claims, deleted the claims for misrepresentation and suppression, and added claims for money had and received and for an accounting. Behlen also removed all explicit references to any fraudulent activity by the Defendants. He argued that SLUSA was no longer applicable to his claims and filed a motion to remand the case to state court.

The district court ultimately entered an order denying Behlen's motion to remand and dismissing all class-wide claims with prejudice – even non-fraud and suppression claims. (App. C.) The dismissal also provided for dismissal of Behlen's individual claims, but without prejudice. Behlen appealed.

B. The Eleventh Circuit's Opinion.

The Eleventh Circuit released its opinion on November 8, 2002. *Behlen v. Merrill Lynch & Co.*, 311 F.3d 1087 (11th Cir. 2002) (App. A). It determined that Behlen's action was completely preempted by SLUSA in all respects, even for non-SLUSA claims. The Eleventh Circuit found that the action was removable because no covered class action can be brought, as opposed to maintained, in state court, apparently construing the doctrine of complete preemption to apply to all claims, even equitable ones, despite the absence of any reference to federal law on the face of the complaint. *Behlen*, 311 F.3d at 1090-93. The Eleventh Circuit did not construe the specific provision of SLUSA which identifies the conditions for removal set forth in 15 U.S.C. § 77p(c); there is no mention of this provision in the opinion. Instead, the Eleventh Circuit referenced the separate provision in 15 U.S.C. § 77p(b), which prohibits any covered class action from being maintained, not brought, in state *or* federal court. The Eleventh Circuit also

reported that Behlen argued that his Complaint was not a "covered class action." *Behlen*, 311 F.3d at 1092.

Finally, deeming jurisdiction to be present under 28 U.S.C. § 1367, the Eleventh Circuit determined that none of Behlen's state-law claims, even equitable claims, may proceed as a class action, and provided for dismissal of them with prejudice rather than remand. It determined that they all were based on allegations of the same fraudulent conduct in connection with purchase of Class B shares, although not alleged in or on the face of the Amended Complaint. Consequently, the Eleventh Circuit effectively held that losses through excess service charges after the purchase could not be a basis for remand of claims not expressly alleging fraud. *Behlen*, 311 F.3d at 1095-96.

REASONS FOR GRANTING THE WRIT

I. Dismissal of the Claims That Do Not Require Consideration of Misrepresentations in Connection with the Purchase or Sale of a Security Is Unjustified and Is in Conflict with a Recent Ninth Circuit Decision.

The Eleventh Circuit's disposition of the case is in conflict with the recent decision of *Falkowski v. Imation Corp.*, 309 F.3d 1123 (9th Cir. 2002), issued about ten days before the Eleventh Circuit's opinion was released. In *Falkowski*, after finding that SLUSA provided for dismissal of fraud claims by former employees in connection with their stock options, the Ninth Circuit concluded it to be improper for the district court to have dismissed the breach-of-contract claims arising out of the same conduct. *Falkowski*, 309 F.3d at 1127 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002)); *see also, Green v. Ameritrade*, 279 F.3d 590 (8th Cir.

2002) (approving the district court's refusal to dismiss supplemental state-law claims of class-wide wrongdoing after dismissal of SLUSA-barred claims).

The Eleventh Circuit's determination that all the claims of class-wide wrongdoing are due to be dismissed is based on a refusal to give full scope to the potential wrongdoing implied by the pleadings. *See Behlen v. Merrill Lynch & Co.*, 311 F.3d 1087, 1095 & n.6 (11th Cir. 2002). Thus, instead of allowing the class allegations of negligence, in the holding of the securities, to be maintained, without regard for any misrepresentation or deceit in the imposition of service charges on Behlen's account, the Eleventh Circuit ruled more broadly. It wrote that Behlen "could not recover on any state law claim alleging that he and the class were wrongfully induced to buy the Class B shares." *Id.* at 1095 n.6. The same applies to equitable claims. The fact that these claims also could be supported by a previous misrepresentation in connection with the actual purchase made by Behlen should be insufficient to justify *dismissal* of those claims, under SLUSA, even as interpreted by the Eleventh Circuit's opinion. Behlen should have been allowed to seek to maintain these claims of class-wide wrongdoing.

The conflict between the Ninth Circuit and Eleventh Circuit decisions is all the more apparent when one considers the authority of the district court over the state-law claims not prohibited from being maintained by SLUSA. Federal-court jurisdiction over such supplemental state-law claims only exists if they are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III . . . ." *See* 28 U.S.C. § 1367(a). In other words, the Ninth Circuit in the *Falkowski* case could only have jurisdiction over the non-SLUSA claims if they bore some significant factual relation to the claims that could *not* be maintained under SLUSA.

Yet, it is this factual relation which the Eleventh Circuit finds to supply the basis for dismissal of *all* claims of class-wide wrongdoing, regardless of whether the claims are based on an untrue statement in connection with the purchase or sale of a security.

In this respect, the Eleventh Circuit's decision also conflicts with this Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 179 & n. 16 (1974) (dismissing "the class action as originally defined . . . without prejudice to any efforts petitioner may make to redefine his class"). The order of dismissal should have provided that it was without prejudice to any efforts that Behlen might make to redefine his allegations of class-wide wrongdoing.

II. The Eleventh Circuit's Holding That SLUSA Authorizes Removal in Accordance with the Doctrine of Complete Preemption Is Erroneous and Conflicts with a Recent Decision of This Court.

The Eleventh Circuit also lacked a basis for removal jurisdiction under 28 U.S.C. § 1441. The directive in SLUSA at 15 U.S.C. § 77p(b) that "[n]o covered class action based on the statutory or common law of any state . . . may be maintained in state or federal court" itself provides no basis for finding that the action may be removed as provided in § 1441. That language says nothing about removal, as available under § 1441,[2] especially given that SLUSA also provides for concurrent federal and state court jurisdiction over all individual claims and over claims of class-wide

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[2] *See, e.g., Syngenta Crop Protection, Inc. v. Henson*, 123 S. Ct. 366, 370-71 (2002) (holding that the All Writs Act, alone or in combination with 28 U.S.C. § 1441, does not furnish removal jurisdiction).

wrongdoing not of the substantive kind listed. *See* 15 U.S.C. § 77v. There is even an affirmative bar against removal of these other types of claims, except as provided in 15 U.S.C. § 77p(c). Oddly though, the Eleventh Circuit made utterly no mention of 15 U.S.C. § 77p(c).

Given this basic structure to SLUSA and the other securities laws, removal was not available under 28 U.S.C. § 1441, unless removal jurisdiction is implicit in the phrase "be maintained" within the bar found in § 77p(b). The significance of the phrase has some importance to the case of *Breuer v. Jim's Concrete of Brevard*, No. 02-337, currently pending before this Court on certiorari review. *See Breuer v. Jim's Concrete of Brevard*, 123 S. Ct. 816 (2003) (granting petition for writ of certiorari). The *Breuer* case presents a question about the effect of the phrase "be maintained" on the removal jurisdiction of a district court, as set forth in Section 216(b) of the Fair Labor Standards Act ("FLSA"). The *Breuer* case was decided by the same panel of the Eleventh Circuit that decided this case. *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308 (11th Cir. 2002).

If this Court concludes in the *Breuer* case that the FLSA's authorization for an action to "be maintained" in state court does not intimate that it is concerned with the issue of removal and affirms the Eleventh Circuit, then the ruling in *Breuer* will conflict with the Eleventh Circuit's ruling in the present case.

In this case, the Eleventh Circuit found that SLUSA's bar against certain covered class actions being "maintained" showed that a question of federal law was presented by a complaint which was otherwise wholly based on state law. Though the Eleventh Circuit did not say so precisely, its invocation of the "complete pre-emption" doctrine to justify the district court's removal jurisdiction was based on a construction of the federal removal statute, 28 U.S.C. § 1441. *See Behlen*, 311 F.3d at 1090 (citing *Caterpillar Inc. v. Williams*,

482 U.S. 386, 393 (1987)). On the other hand, the Eleventh Circuit's decision in the *Breuer* case found that the use of the same phrase in the FLSA evidenced nothing about whether removal was available under 28 U.S.C. § 1441. Therefore, the *Breuer* case found that the right of action conferred by Section 216(b) of the FLSA was a federal question not otherwise barred from removal.

Petitioner believes that SLUSA's use of the phrase "be maintained" is a reference to the process of determining whether a complaint which alleges class-wide wrongdoing may proceed in a way that binds absent third persons, i.e., as a class action. *See* Rule 23, Fed. R. Civ. P.; *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982) ("[T]he allegation . . . neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified."). On its face, the phrase is not synonymous with a directive that no action be commenced. Given the subject matter – allegations of class-wide wrongdoing based on state law which are subject to rigorous analysis before being "maintained" as a class action – it seems highly implausible that Congress meant to allow removal for the mere filing of a complaint.

Had the Eleventh Circuit not found that the "complete pre-emption" doctrine controlled here, it would have reversed the district court's finding of removal jurisdiction over the complaint. The Eleventh Circuit obviously was guided by its own precedent in *Riley v. Merrill Lynch*, 292 F.3d 1334, 1341 (11th Cir.), *cert. denied*, 123 S. Ct. 395 (2002), which was decided after the present case was argued and in which it was announced, with no discussion of 15 U.S.C. § 77v, that "Congress passed the SLUSA . . . and made federal court, with limited exceptions, the sole *venue* for class actions alleging fraud in the purchase and sale of covered securities." *See Behlen*, 311 F.3d at 1091-92, 1093 (citing *Riley*, 292 F.3d at 1341) (emphasis added).

The Eleventh Circuit's approach to federal-court jurisdiction and preemption is more expansive than this Court's precedents allow,[3] even when an exclusive venue is intended. The language of SLUSA is insufficient to identify federal court as an exclusive venue for actions based on state law.

In a case decided after oral argument in the Eleventh Circuit, this Court ruled that a perceived congressional purpose to promote uniformity in a field of law, as opposed to a text that requires it, does not justify a finding of "complete pre-emption." In *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 122 S. Ct. 1889 (2002), this Court refused to find that the U.S. Court of Appeals for the Federal Circuit was the exclusive venue for appeals from cases related to patents, unless it was apparent on the face of the complaint. Drawing on the principles from the cases construing the general federal-question statute, 28 U.S.C. § 1331, this Court reaffirmed the well-pleaded-complaint rule at length and refused to find that a

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[3] *See, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 380-86 (1996) (holding that 28 U.S.C. § 1738 was not repealed impliedly by 15 U.S.C. § 78aa to bar a state-court decreed class settlement of federal securities claims); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 478-79 (1977) (holding that a claim of breach of fiduciary duty that does not include an allegation of misrepresentation or nondisclosure of a material fact is not a claim under the Securities Exchange Act of 1934); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) (holding that there was no federal jurisdiction under either of the 1933 or 1934 securities acts over claims based on allegations of mere negligence in the failure to conduct proper audits, and stating that "[w]hen a statute speaks so specifically in terms of manipulation and deception . . . and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute to negligent conduct").

counterclaim related to patents sufficed to confer federal jurisdiction. *See Holmes Group*, 122 S. Ct. at 1893-95. Thus, to the extent that the Eleventh Circuit's opinion relies on a perceived congressional goal to promote uniformity in the administration of the securities laws, rather than the text of SLUSA itself, it conflicts with the *Holmes Group* decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

311 F.3d 1087

Fed. Sec. L. Rep. P 92,201, 16 Fla. L. Weekly Fed. C 13

United States Court of Appeals,
Eleventh Circuit.

Charles H. BEHLEN, individually and on behalf of a class of similarly situated persons and entities, Plaintiff-Appellant,

v.

MERRILL LYNCH, Phoenix Investment Partners, Ltd., Defendants-Appellees.

No. 01-16424.
Nov. 8, 2002.

[West headnotes and summary deleted]

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Appeal from the United States District Court for the Southern District of Alabama.

Before WILSON, RONEY and ALARCON*, Circuit Judges.

WILSON, Circuit Judge:

Charles H. Behlen, individually and on behalf of a class of similarly situated individuals, appeals the district court's denial of his motion to remand his case to state court and its order dismissing his lawsuit. The district court determined that it had removal and supplemental jurisdiction over the action and therefore denied the motion to remand. The court further determined that the action was barred by the Securities Litigation Uniform Standards Act of 1998 (SLUSA), 15 U.S.C. §§ 77p, 78bb. Thus, the court dismissed Behlen's class-wide claims with prejudice and his individual claims without prejudice. Because we determine that the action was preempted by the SLUSA and subject to dismissal, we affirm.

BACKGROUND

From November 1999 to March 2000 Behlen purchased shares in a mutual fund known as the Phoenix-Engemann Aggressive Growth Fund. Behlen purchased the shares from Merrill Lynch & Co. and Phoenix Investment Partners, Ltd. (the defendants). On March 15, 2001, Behlen filed a civil action in state court seeking to recover money damages

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*Honorable Arthur L. Alarcon, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

resulting from his purchase of those shares. In his original complaint, which was styled as a class action, Behlen asserted various state law claims, including claims for breach of contract, breach of implied covenants and duties, breach of fiduciary duty, unjust enrichment, suppression, misrepresentation, and negligence and/or wantonness. He alleged that the defendants sold him and the class members Class B shares in the growth fund when they were unknowingly eligible to purchase Class A shares. He further alleged that the defendants sold them the wrong shares, because the Class B shares were subject to higher fees and commissions than the Class A shares.

On April 27, 2001, the defendants removed the lawsuit from state court to the United States District Court for the Southern District of Alabama, asserting that the district court had subject matter jurisdiction over the case pursuant to the SLUSA. Three days later, the defendants filed a motion to dismiss Behlen's complaint. Behlen subsequently filed an amended complaint, in which he asserted the same state law claims, deleted the claims for misrepresentation and suppression, and added claims for money had and **[*1090]** received and for an accounting. Behlen also removed all explicit references to any fraudulent activity by the defendants. He argued that the SLUSA was no longer applicable to his claims and filed a motion to remand the case to state court.

The district court ultimately denied Behlen's motion to remand and granted the defendants' motion to dismiss the action, dismissing the class-wide claims with prejudice and Behlen's individual claims without prejudice. This appeal followed.

STANDARD OF REVIEW

We review the denial of a motion to remand de novo. *Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207, 1211 (11th Cir. 1999). We also "review[ ] *de novo* the dismissal of a complaint pursuant to [Federal Rule of Civil Procedure] 12(b)(6)." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1187 (11th Cir. 2002).

DISCUSSION

I. Removal Jurisdiction

We first address whether the district court had removal jurisdiction over this action. Although Behlen asserted only state law claims in his original complaint, the defendants removed the case to the district court based upon their belief that Behlen actually alleged violations of federal securities laws, which fell within the scope of the SLUSA.

Generally, whether an action raises a federal question "is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L.Ed.2d 318 (1987). Thus, the plaintiff is "the master of the claim ... [and] may avoid federal jurisdiction by exclusive reliance on state law." *Id.* Furthermore, "a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Id.* at 393, 107 S. Ct. 2425.

The Supreme Court, however, has recognized "an 'independent corollary' to the well-pleaded complaint rule, known as the 'complete pre-emption' doctrine." *Id.* (citation omitted). The Court explained,

> On occasion, the Court has concluded that the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.

Id. (citation omitted) (internal quotation marks omitted).

Thus, whether a district court has removal jurisdiction over a state law case alleging securities fraud depends upon whether the claims fall within the scope of the SLUSA and are therefore preempted. In making this determination, it is helpful to consider the SLUSA and its historical context.

Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA), which established uniform standards for class actions alleging securities fraud. The procedural reforms enacted by the PSLRA were intended to prevent plaintiffs **[*1091]** from bringing "strike suits"[1] in

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[1] A strike suit is defined as "[a] suit . . . often based on no valid claim, brought either for nuisance value or as leverage to obtain a favorable or inflated settlement." *Black's Law Dictionary* 1448 (Bryan A. Garner ed., 7th ed.

securities matters. H.R. Conf. Rep. No. 105-803, at 13 (1998) (discussing the PSLRA). Congress found that the high costs of defending strike suits often forced defendants to settle meritless class actions. H.R. Conf. Rep. No. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 730. The PSLRA addressed this problem by instituting heightened pleading requirements for class actions alleging fraud in the sale or purchase of national securities.[2] *Riley v. Merrill Lynch,*

1999).

[2] Section 78u-4 provides in relevant part,

(1) Misleading statements and omissions

In any private action arising under this chapter in which the plaintiff alleges that the defendant--

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

. . . .

(3) Motion to dismiss; stay of discovery

(A) Dismissal for failure to meet pleading requirements

In any private action arising under this chapter, the court shall, on the motion of any defendant, dismiss the complaint if the requirements of paragraphs

(continued...)

Pierce, Fenner & Smith, Inc., 292 F.3d 1334, 1340 (11th Cir.), *cert. denied*, 71 U.S.L.W. 3178 (U.S. Oct. 15, 2002) (No. 02-378). The PSLRA also required a mandatory stay of discovery until the district court could determine the legal sufficiency of the class action claims. *See* 15 U.S.C. § 78u-4(b)(3)(B).

By 1998, however, it became apparent to Congress that the objectives of the PSLRA were being frustrated, because plaintiffs were evading its heightened pleading requirements by bringing suit in state court rather than federal court. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 2(2)-(3), 112 Stat. 3227, 3227; *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 108 (2d Cir. 2001) (noting that "litigants were able to assert many of the same causes of action, but avoid the heightened procedural requirements instituted in federal court"). Congress thus resolved that in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the

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[2] (...continued)
(1) and (2) are not met.
(B) Stay of discovery
In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

15 U.S.C. § 78u-4(b)(1), (3).

appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.

Pub. L. No. 105-353, § 2(5).

As a result, Congress passed the SLUSA, which amended the Securities Act of 1933 and the Securities Exchange Act of 1934 and made federal court, with limited exceptions, the sole venue for class actions alleging fraud in the purchase and sale of **[*1092]** covered securities.[3] *Riley,*

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[3] The SLUSA amended the 1933 Act to provide as follows:

> (b) Class action limitations
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging-
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.
>
> (c) Removal of covered class actions
>
> Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

(continued...)

292 F.3d at 1341. Congress further mandated that such class actions would be governed by federal law rather than state law. *See* H.R. Conf. Rep. No. 105-803, at 13. To that end, the SLUSA preempts certain state law claims, allows for removal of state actions to federal court, and requires immediate dismissal of "covered lawsuits." *Riley*, 292 F.3d at 1341.

A party seeking to remove an action to federal court pursuant to the SLUSA bears the burden of showing that "(1) the suit is a 'covered class action,' (2) the plaintiffs' claims are based on state law, (3) one or more 'covered securities' has been purchased or sold, and (4) the defendant misrepresented or omitted a material fact 'in connection with the purchase or sale of such security.' " *Id.* at 1342 (emphasis omitted). The district court found that each of these requirements had been met and that the action was therefore removable. Behlen, however, argues that the case was not removable, because the action was not a "covered class action" and the misconduct alleged in the complaint was not "in connection with" the sale or purchase of a security.

A. "Covered Class Action"

Behlen argues that his case was not removable, because it was not a "covered class action." Behlen points to the statutory language of the SLUSA, which provides that "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be *maintained* in any State or Federal court by any private party." 15 U.S.C.

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[3] (...continued)
15 U.S.C. § 77p(b)-(c). An identical amendment was made to the 1934 Act. *See id.* § 78bb(f)(1)-(2).

§§ 77p(b), 78bb(f)(1) (emphasis added). Behlen contends that at the time of removal the case was not maintained as a class action, because the state court had not determined whether the case should proceed in a class-wide fashion.

We find no merit in Behlen's argument and believe that it is based upon a misreading of the statute. The SLUSA does not require that an action be "maintained as a class action" before it can be removed; rather, it merely provides that no class action falling within the scope of its coverage can be maintained in a state or federal court, which means that dismissal of a "covered class action" is required. *Prager v. Knight/Trimark Group, Inc.*, 124 F. Supp. 2d 229, 231 (D. N.J.2000).

The SLUSA defines a "covered class action" as

> any single lawsuit in which . . . damages are sought on behalf of more than 50 persons or *prospective* class members, and questions of law or fact common to those persons or members of the *prospective* class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate **[*1093]** over any questions affecting only individual persons or members.

15 U.S.C. §§ 77p(f)(2)(A)(i)(I), 78bb(f)(5)(B)(i)(I) (emphasis added). We thus believe that it is clear from the statutory language that prospective class actions are removable to federal court even if the state court has not determined whether the action should go forward as a class action. Were we to find that a class action must be "maintained" as such *before* it is subject to removal under the SLUSA, we

essentially would require that the action be certified in state court before it could be removed to federal court. Nothing in the statutory language of the SLUSA, however, suggests that certification prior to removal is required. Indeed, requiring certification prior to removal would frustrate the objectives of the SLUSA rather than further them. The SLUSA's provisions "were designed to enable securities defendants to obtain early dismissal of frivolous class actions, and thereby avoid the high expense of discovery." *Riley*, 292 F.3d at 1341. Requiring certification prior to removal would entail potentially lengthy and expensive pretrial practice and discovery in state court, regardless of the merits of the action. We believe that such a prospect is contrary to the stated objectives of the SLUSA.

B. "In Connection with"

Behlen next argues that the district court's exercise of removal jurisdiction over his case was improper, because the misconduct alleged in the complaint did not occur "in connection with" the sale or purchase of securities.

The SLUSA does not define the phrase "in connection with the purchase or sale of a covered security." The Supreme Court has not had occasion to interpret this phrase in the context of the SLUSA, but has interpreted the identical phrase as it appears in Rule 10b-5, which implements section 10(b) of the 1934 Act.[4] *See Blue Chip*

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[4] Section 10(b) makes it "unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . ., any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." Securities Exchange Act of

(continued...)

Stamps v. Manor Drug Stores, 421 U.S. 723, 737-38, 95 S. Ct. 1917, 44 L.Ed.2d 539 (1975). Thus, in *Riley*, we looked to *Blue Chip* when we determined that Congress intended the phrase "in connection with" to have the same meaning under the SLUSA that it has under section 10b-5, because the SLUSA was enacted as an amendment to the 1933 and 1934 Acts. 292 F.3d at 1342-43; *see also Green v. Ameritrade, Inc.*, 279 F.3d 590, 597 (8th Cir. 2002).

In *Blue Chip*, the Supreme Court held that there is no cause of action under section 10b-5 unless a challenged misrepresentation or omission caused the plaintiff to buy or sell a particular stock. 421 U.S. at 748-49, 95 S. Ct. 1917. Based upon that holding, the Eighth Circuit held in *Green* that the SLUSA did not preempt a state law breach of contract claim where the plaintiff failed to allege that the defendants made misrepresentations that caused them to buy a covered security. 279 F.3d at 598-99. Green filed a breach of contract action in state court, alleging that he contracted with Ameritrade to receive "real time" stock quotes on Ameritrade's Web site, but the quotes listed on the site actually were not in real time. *Id.* at 593-94. The court found that Green did not allege in his amended complaint that the delayed quotes caused him to buy or **[*1094]** sell a covered security; rather, he merely alleged that he contracted for a service, but did not receive the kind of information for which he believed he was paying. *Id.* at 598-99.

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[4] (...continued)
1934 § 10(b), 15 U.S.C. § 78j(b). Rule 10b-5 prohibits the use of "any device, scheme, or artifice to defraud" or any other "act, practice, or course of business" that "operates . . . as a fraud or deceit." 17 C.F.R. § 240.10b-5.

In contrast to the plaintiff in *Green*, Behlen specifically alleged that the defendants "negligently, recklessly or intentionally misrepresented the fact that Plaintiff and the class would be sold Class A shares," but "sold to them more expensive Class B shares." Additionally, he alleged that the defendants "suppressed the true facts concerning the repeated sales to them of Class B Shares" and "concealed and suppressed the illegality of their conduct ... and continued to sell them Class B shares." It is clear that the crux of the complaint was that the defendants either misrepresented or omitted crucial facts about the Class A and Class B shares, thus causing him and the class to invest in inappropriate securities. Behlen argues, however, that these wrongful acts were not made "in connection with" the sale of securities, but merely were incidental to the sale of the securities.

We believe Behlen's claims are similar to the claims asserted by the plaintiffs in *Dudek v. Prudential Securities, Inc.*, 295 F.3d 875 (8th Cir. 2002). In that case, the plaintiffs filed a class action suit in state court alleging that the defendants improperly marketed tax-deferred annuities to accounts that already enjoyed tax-deferred status. *Id.* at 877. The plaintiffs argued that the annuities were inappropriate investments, "because tax-deferred accounts did not need the tax benefits, and therefore the extra fees and costs that tax-deferred annuities entail[ed] were a waste of the investors' money." *Id.* The plaintiffs acknowledged that the annuities at issue were "covered securities," but argued that their claims were not preempted by the SLUSA because they were based upon the defendants excessive fees rather than misconduct "in connection with" the sale of securities. *Id.* at 878. The Eighth Circuit rejected the plaintiffs' argument that they did not allege fraud, misrepresentation, or an omission of material fact; it agreed with the district

court that the gravamen of the plaintiffs' complaint "involve[d] an untrue statement or substantive omission of a material fact in connection with the purchase or sale of a covered security." *Id.* at 879 (internal quotation marks omitted).

In the instant case, although Behlen argues that the excess fees and commissions paid by the class members were incidental to the sale of the securities, it seems certain that the very reason they were sold the Class B shares was *because* those shares were subject to the excess fees and commissions. Thus, the fees and commissions were not incidental to the sale of the securities, but were an integral part of the transactions. To the extent that the defendants misrepresented which shares would be sold to the class, those misrepresentations were made "in connection with" the sale of the shares.[5]

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[5] In support of his argument, Behlen relies heavily upon *SEC v. Zandford*, 238 F.3d 559 (4th Cir. 2001), *rev'd*, 535 U.S. 813, 122 S. Ct. 1899, 153 L.Ed.2d 1 (2002). That decision was reversed, however, by a unanimous Supreme Court. *See Zandford*, 535 U.S. 813, 122 S. Ct. 1899, 153 L.Ed.2d 1. The Court noted that the SEC always has adopted a broad reading of the phrase "in connection with the purchase or sale of any security." *Id.* at 1903. The Court stated, "While the statute must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of § 10(b), neither the SEC nor this Court has ever held that there must be a misrepresentation about the value of a particular security in order to run afoul of the Act." *Id.* (citation omitted). The Court went on to state that the securities sales and the broker's fraudulent acts were not independent events, but, in fact, coincided with each other because each sale was made to further the broker's

[*1095] Having determined that the action was a "covered class action" alleging misrepresentation "in connection with" the sale of covered securities, we conclude that the removal of the case pursuant to the SLUSA was proper. Furthermore, once the case was removed to the district court, the SLUSA required that it be dismissed.[6]

II. Remand

We now address whether the district court should have remanded the case to state court after Behlen amended his complaint. Behlen argues that even if the action was removable to district court, the court should have remanded the case back to state court after he amended his complaint. Behlen admits that he amended the complaint to delete all

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fraudulent scheme. *Id.* at 1904.

[6] Behlen further argues that the district court erred in dismissing the class-wide claims with prejudice. Behlen characterizes the district court's dismissal of the class-wide claims as a ruling that the class action could not be certified. The district court, however, did not determine whether Behlen satisfied the certification requirements of Federal Rule of Civil Procedure 23. The district court simply adhered to the text of §§ 77p and 78bb and determined that Behlen's class-wide claims were barred.

Because Behlen's case was a "covered class action" asserting state law claims that fell within the scope of the SLUSA, the district court had no choice but to dismiss the class-wide claims. Furthermore, the claims were subject to dismissal with prejudice, because Behlen could not recover on *any* state law claim alleging that he and the class were wrongfully induced to buy the Class B shares.

claims and allegations that might be deemed to fall within the scope of the SLUSA. Absent allegations of misrepresentation, he argues, the complaint no longer contained allegations of the kind of misconduct covered by federal securities laws. Behlen thus contends that the district court no longer had subject matter jurisdiction over the case and should have remanded the case to state court.

In *Poore v. American-Amicable Life Insurance Co. of Texas*, 218 F.3d 1287, 1290-91 (11th Cir. 2000), we joined our sister circuits in holding that if a district court has subject matter jurisdiction over a diversity action at the time of removal, subsequent acts do not divest the court of its jurisdiction over the action. Accordingly, we held that even though the plaintiffs amended their complaint to reduce the amount in controversy, the district court still retained diversity jurisdiction over the action and "committed reversible error by remanding based on Appellees' post-removal amended complaint." *Id.* at 1292.

In the instant case, the district court had federal question jurisdiction over Behlen's original complaint, because the claims therein were preempted by the SLUSA. Pursuant to 28 U.S.C. § 1367(a), the court also had supplemental jurisdiction over the remaining state law claims in the original complaint. The court had discretion to retain jurisdiction over the state law claims even after Behlen amended the complaint to remove any federal cause of action. *See Porsche Cars N. Am., Inc. v. Porsche.Net*, 302 F.3d 248, 256 (4th Cir. 2002); *Mauro v. S. New England Telecomms., Inc.*, 208 F.3d 384, 388 (2d Cir. 2000) (per curiam). Moreover, it was proper for the court to retain jurisdiction over Behlen's amended complaint, because, despite his removal of the allegations that would bring his

in March 1997 and again in September 1997 – for driving under the influence of alcohol, although he had not been convicted of either offense. E.T. admitted that he had continued to drive home on occasion after he had "had two or three beers at the Stadium Grill.... I mean, it's kind of hard to stop at Applebee's or wherever and not drive to get home whether you have one or twenty."

A representative of DHR testified that, although DHR's policy was to seek a relative for placement when an appropriate relative could be located, in the representative's five and one-half years of experience with DHR she had never known DHR to remove a child from a home after the child had been placed in the home as an infant and had remained in the home for three years.

A.M.A. is now five and one-half years old. Every witness testified that the child is a happy, loving child. The trial court, in its discretion, awarded custody of A.M.A. to S.P., who has had physical custody of the child since she was an infant and who has provided the only home, and in a real sense, has been the only mother, the child has ever known.

Because the lead opinion in *W.T.M. II* considered this case to involve a dependency proceeding, our mandate that the trial court apply a "best-interests" standard on remand was consistent with Ala. Code 1975, § 12-15-71(a). That statute provides, in pertinent part:

> "If a child is found to be dependent, the court may make any of the following orders of disposition *to protect the welfare of the child:*

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

JAN 13 2003

THOMAS K. KAHN
CLERK

No. 01-16424-DD

CHARLES H. BEHLEN,
individually and on behalf of a
class of similarly situated persons
and entities,

Plaintiff-Appellant,

versus

MERRILL LYNCH,
PHOENIX INVESTMENT PARTNERS, LTD.,

Defendants-Appellees.

On Appeal from the United States District Court for the
Southern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: WILSON, RONEY and ALARCON*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

*Honorable Arthur L. Alarcon, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILE COPY

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CHARLES H. BEHLEN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION 01-0298-M
	:	
MERRILL LYNCH & CO., INC., et al.,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION AND ORDER

This action comes before the Court on Defendants' Motion to Dismiss (Docs. 2-3), Plaintiff's Motion to Remand (Doc. 15), Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (Docs. 16-17), Defendants' Brief Opposing Plaintiff's Motion to Remand (Doc. 21), Plaintiff's Response to Defendants' Motion to Dismiss (Doc. 22), Plaintiff's Reply to Defendants' Brief regarding Remand (Doc. 25), and Defendants' Reply Brief Regarding Dismissal (Doc. 26). Jurisdiction has been invoked in this Court under The Securities Litigation Uniform Standards Act of 1998

(hereinafter SLUSA). 15 U.S.C. §§ 77p, 78bb(f). The parties consented in writing to have all matters and proceedings in this action conducted by the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(c) (see Doc. 14). After consideration, Defendants' Motion to Dismiss is GRANTED and this action is DISMISSED.

The facts of this action, briefly, are as follows. Beginning on November 5, 1999, Plaintiff Charles H. Behlen purchased shares in the Phoenix-Engemann Aggressive Growth Fund, and from other affiliated Phoenix funds from Defendants Merrill Lynch & Co, Inc and Phoenix Investment Partners, Ltd. (Doc. I, Complaint ¶¶ 1, 11).[1] On March 15, 2001, Behlen brought a civil action in the Mobile County Circuit Court to recover monetary damages which accrued from the purchase of those Growth Fund shares (Doc. 1, ¶ 1). Plaintiff raised seven claims in that complaint: breach of contract, breach of implied covenants and duties, breach of fiduciary duty, unjust enrichment, suppression, misrepresentation, and negligence and/or wantonness; Behlen's action is styled as a class action complaint (Doc. 1, Complaint). On April 27, 2001, Defendants removed the action to this Court, asserting SLUSA jurisdiction (Doc. 1). Plaintiff subsequently filed an amended complaint (Doc. 9). Defendants now seek to have this action dismissed while Plaintiff would have the action remanded back to the state court.

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[1] The Court will refer to Merrill Lynch and Phoenix Investment Partners, Ltd. collectively as Defendants.

The Court first needs to determine whether it properly has jurisdiction over this matter. In its removal petition, Defendant alleges jurisdiction under 15 U.S.C. §§ 77p,

78bb(f) and that this action is removable pursuant to 28 U.S.C. § 1441(b) (Doc. 1). In a removal action, the party asserting jurisdiction has the burden of establishing proof of it by a preponderance of the evidence. *McNutt v. General Motors Acceptance Co. of Indiana, Inc.*, 298 U.S. 178 (1936). In a removal action, that burden is upon the defendant. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921). Removal is a statutory remedy which must be narrowly construed so as to limit federal jurisdiction. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941); *Robinson v. Quality Ins. Co.*, 633 F. Supp. 572 (S.D. Ala. 1986).

Before the jurisdictional issue can be settled, the Court must determine which complaint to examine. Behlen asserts that the Court should look at the amended complaint while Defendants argue that the original complaint is the appropriate pleading to consider. The Eleventh Circuit Court of Appeals has held that "the district court must determine whether it had subject matter jurisdiction at the time of removal." *Poore v. American-Amicable Life Ins. Co. of Texas*, 218 F.3d 1287, 1290-91 (11th Cir. 2000). The *Poore* Court went on to say that events occurring after removal . . . do not oust the district court's jurisdiction." *Poore*, 218 F.3d at 1291; *see also St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 287 (1938). On the basis of *Poore*, the Court will examine the original complaint to determine if jurisdiction existed at the time of removal.

The Court notes, summarily, that Congress, in 1995, passed the Private Securities Litigation Reform Act as a means of limiting a plaintiff's ability to bring class action securities lawsuits. To bypass the new restrictions, plaintiffs began filing securities actions in state courts. In 1998, Congress passed SLUSA to prevent this practice.

Under SLUSA,

> [n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase of sale of a covered security.

15 U.S.C. § 77p(b). Any state action which meets these criteria shall be removed "to the Federal district court for the district in which the action is pending." 15 U.S.C. § 77p(c). Defendants removed this action to this Court, citing these statutes.

To determine if this Court enjoys jurisdiction over this matter, it will be necessary to examine § 77p(b) more closely. The term covered class action has been defined to include a single lawsuit "in which damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class . . . predominate over any "questions affecting only individual persons or members." 15 U.S.C. § 77p(f) (2) (A) (i) (I). In the complaint, Behlen alleges that "the class exceeds several thousand members" (Doc. 1, Complaint, ¶ 19) . The complaint further states that "[t]here are questions of law

and fact common to members of the class which have resulted in a common pattern of damage sustained. These questions of law and fact predominate over any questions affecting individual class members." *Id.* at ¶ 22. Plaintiff seeks both compensatory and punitive damages. *Id.* at p. 9, ¶ c. The Court finds that this action is a covered class action.

The definition of covered security includes "a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940." 15 U.S.C. § 77r(b) (2); see also 15 U.S.C. § 77p(f) (3). Defendants assert that "[t]he Funds are, of course, registered under the Investment Company Act of 1940, and the Class B shares purchased by Plaintiff and the class were issued by the Funds" (Doc. 1, ¶ 12). Though the Court has found no evidence in the record to support the assertion, Behlen has not challenged it. The Court finds that the securities which are the subject of this action fall within the definition of covered securities.

The Court now must make a determination as to whether the remainder of § 77p(b) is satisfied. This requires an assertion of "an untrue statement or omission of a material fact" or that Defendants "used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b) (1, 2).

In bringing this action, Behlen, in the opening paragraphs of the complaint, makes the following assertions:

> 1. This is a class action brought by Plaintiff Charles H. Behlen "Behlen") on

behalf of a class composed of all individuals and entities who were wrongfully sold and charged excessive commission on Class B shares in the Phoenix-Engemann Aggressive Growth Fund ("Growth Fund") and other "affiliated Phoenix funds," by Merrill Lynch & Co., Inc. and Phoenix Investments Partners, Ltd., along with other possible unknown parties, when they were eligible for reduced sales charges of commissions from the purchase of Class A shares in the same.

2. Defendants wrongfully sold to Plaintiff and the class Class B shares in the Growth Funds and other "affiliated Phoenix funds" when they should have sold to Plaintiff and the class Class A shares at reduced sales charges and commissions. The Defendants knew or should have known that Plaintiff and the class were eligible to purchase Class A shares for reduced sales charges and commissions, but deliberately sold to Plaintiff and the class the Class B shares so as to wrongfully charge higher commissions for such transactions.

3. Recognizing that they should have sold to Plaintiff and the class members Class A shares and not Class B shares, the Defendants concealed and suppressed the illegality of their conduct from the Plaintiff and the class and continued to sell them Class B shares at higher commissions and charges.

> 4. Defendants' wrongful and unconscionable conduct constitutes a pattern and practice of intentional, willful, wanton, reckless, negligent and/or grossly negligent conduct.

Doc. 1, Complaint. This language, which provides clear evidence of Behlen's assertion of Defendants' misfeasance, would appear to satisfy the requirement of § 77p (b).

Plaintiff asserts, though, that Defendants have not proven that the transactions were "in connection with" the purchase or sale of the underlying securities. More specifically, Behlen argues that he is not challenging the securities; rather, his problem is "with the overcharging of sales commissions and fees" (Doc. 22, p. 26). Plaintiff asserts that his purchase of approximately $500,000 worth of shares was split into three separate purchases, rather than one large purchase, which resulted in higher commissions and fees charged to him (Doc. 22, p. 4). Additionally, Behlen has asserted that because of the large volume of shares that he was purchasing, he should have been acquiring Class A shares rather than the Class B shares which he actually purchased (*id.* at p. 5). Plaintiff maintains that these additional commissions and fees, for which she has brought this action, do not fall within the "in connection with" language of SLUSA.

Plaintiff has pointed to several cases as support for his argument. *See, e.g., Green v. Ameritrade, Inc.*, 120 F. Supp. 2d 795 (D. Neb. 2000) (SLUSA did not preempt subscribers' state law claims against internet securities information service's failure to provide "real time" market quotes as promised); *Abada v. Charles Schwab & Co., Inc.*, 127 F. Supp. 2d 1101 (S.D. Cal. 2000) (SLUSA did not preempt investors'

claim that stockbroker failed to deliver on assertion of immediate online trade transactions); *Shaw v. Charles Schwab & Co., Inc.*, 128 F. Supp. 2d 1270 (C.D. Cal. 2001) (SLUSA did not preempt claim that stock broker's promise resulted in selection of that broker, as opposed to other brokers, as claim did not concern selection of particular securities). The Court does not, however, find these cases instructive because the plaintiffs are not claiming that they got the wrong securities; while their lawsuits revolved around the purchase of securities, the securities themselves were only tangentially related to the actual claim.

In this action, the heart of Plaintiff's claim is that he did not get the shares that he now believes that he should have received. Behlen repeatedly states that he should have been purchasing Class A shares rather than the Class B shares because he could have acquired them and paid less money for fees and commissions.

The Court finds that Defendants have satisfied their burden of establishing that this Court has jurisdiction over this action pursuant to SLUSA. Accordingly, Plaintiff's Motion to Remand is DENIED (Doc. 15).

Defendants have also sought to have this action dismissed. The Court notes that Plaintiff has not provided any indication that he wishes to continue with this action in the event that this Court determines that it is governed by SLUSA. Because Behlen has not indicated a preference of pursuing his own individual claims in either the state or federal courts, this Court will assume that he would prefer the state court as that was where the action was originally filed.

Having reached the determination that this action falls within the language of SLUSA, and finding that SLUSA requires such action, the Court GRANTS Defendant's Motion to Dismiss (Doc. 2). This action is DISMISSED WITH PREJUDICE as to the class action claims and DISMISSED WITHOUT PREJUDICE as to Behlen's individual claims.

DONE this 27th day of August, 2001.

s/ Bert W. Milling, Jr.
BERT W. MILLING, JR.
UNITED STATES MAGISTRATE JUDGE

JUDGMENT ENTERED
ON DOCKET
Date 8/31/01 s/ [illegible initials]
CHARLES R. DIARD, JR. CLERK

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED THIS THE
27TH DAY OF AUGUST,
2001. JUDGMENT ENTRY ____
NO. 10034-D
CHARLES R. DIARD, JR., CLERK
BY s/ Cynthia [illegible]
DEPUTY CLERK

APPENDIX D

Public Law 105-353
105th Congress

An Act

To amend the Securities Act of 1933 and the Securities Exchange Act of 1934 to limit the conduct of securities class actions under State law, and for other purposes. [Nov. 3, 1998 [S. 1260]]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE. [Securities Litigation Uniform Standards Act of 1998. 15 USC 78a note.]

This Act may be cited as the "Securities Litigation Uniform Standards Act of 1998".

SEC. 2. FINDINGS. [15 USC 78a note.]

The Congress finds that –

(1) the Private Securities Litigation Reform Act of 1995 sought to prevent abuses in private securities fraud lawsuits;

(2) since enactment of that legislation, considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts;

(3) this shift has prevented that Act from fully achieving its objectives;

(4) State securities regulation is of continuing importance, together with Federal regulation of securities, to protect investors and promote strong financial markets; and

(5) in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.

TITLE I—SECURITIES LITIGATION UNIFORM STANDARDS

SEC. 101. LIMITATION ON REMEDIES.

(a) AMENDMENTS TO THE SECURITIES ACT OF 1933.—

(1) AMENDMENT.—Section 16 of the Securities Act of 1933 (15 U.S.C. 77p) is amended to read as follows:

"SEC. 16. ADDITIONAL REMEDIES; LIMITATION ON REMEDIES.

"(a) REMEDIES ADDITIONAL.—Except as provided in subsection (b), the rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.

"(b) CLASS ACTION LIMITATIONS. —No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

"(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

"(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

"(c) REMOVAL OF COVERED CLASS ACTIONS. —Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

"(d) PRESERVATION OF CERTAIN ACTIONS.—

"(1) ACTIONS UNDER STATE LAW OF STATE OF INCORPORATION. —

"(A) ACTIONS PRESERVED. —Notwithstanding subsection (b) or (c), a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

"(B) PERMISSIBLE ACTIONS. —A covered class action is described in this subparagraph if it involves—

"(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

"(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that—

"(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

"(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

"(2) STATE ACTIONS.—

"(A) IN GENERAL. —Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

"(B) STATE PENSION PLAN DEFINED. —For purposes of this paragraph, the term 'State pension plan' means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

"(3) ACTIONS UNDER CONTRACTUAL AGREEMENTS BETWEEN ISSUERS AND INDENTURE TRUSTEES. —Notwithstanding subsection (b) or (c), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee

may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

"(4) REMAND OF REMOVED ACTIONS. —In an action that has been removed from a State court pursuant to subsection (c), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

"(e) PRESERVATION OF STATE JURISDICTION. —The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

"(f) DEFINITIONS. —For purposes of this section, the following definitions shall apply:

"(1) AFFILIATE OF THE ISSUER. —The term 'affiliate of the issuer' means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

"(2) COVERED CLASS ACTION. —

"(A) IN GENERAL. —The term 'covered class action' means —

"(i) any single lawsuit in which —

"(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

"(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

"(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

"(I) damages are sought on behalf of more than 50 persons; and

"(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

"(B) EXCEPTION FOR DERIVATIVE ACTIONS. –Notwithstanding subparagraph (A), the term 'covered class action' does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

"(C) COUNTING OF CERTAIN CLASS MEMBERS. –For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

"(D) RULE OF CONSTRUCTION. – Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

"(3) COVERED SECURITY. –The term 'covered security' means a security that satisfies the standards for

a covered security specified in paragraph (1) or (2) of section 18(b) at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this title pursuant to rules issued by the Commission under section 4(2).".

(2) CIRCUMVENTION OF STAY OF DISCOVERY. – Section 27(b) of the Securities Act of 1933 (15 U.S.C. 77z-1(b)) is amended by inserting after paragraph (3) the following new paragraph:

"(4) CIRCUMVENTION OF STAY OF DISCOVERY. – Upon a proper showing, a court may stay discovery proceedings in any private action in a State court as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this subsection.".

(3) CONFORMING AMENDMENTS. – Section 22(a) of the Securities Act of 1933 (15 U.S.C. 77v (a)) is amended –

(A) by inserting "except as provided in section 16 with respect to covered class actions," after "Territorial courts,"; and

(B) by striking "No case" and inserting "Except as provided in section 16(c), no case".

(b) AMENDMENTS TO THE SECURITIES EXCHANGE ACT OF 1934. –

(1) AMENDMENT. – Section 28 of the Securities Exchange Act of 1934 (15 U.S.C. 78bb) is amended –

(A) in subsection (a), by striking "The rights and remedies" and inserting "Except as provided in subsection (f), the rights and remedies"; and

(B) by adding at the end the following new subsection:

"(f) LIMITATIONS ON REMEDIES. –

"(1) CLASS ACTION LIMITATIONS. –No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

"(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

"(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

"(2) REMOVAL OF COVERED CLASS ACTIONS. –Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

"(3) PRESERVATION OF CERTAIN ACTIONS. –

"(A) ACTIONS UNDER STATE LAW OF STATE OF INCORPORATION. –

"(i) ACTIONS PRESERVED. –Notwithstanding paragraph (1) or (2), a covered class action described in clause (ii) of this subparagraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

"(ii) PERMISSIBLE ACTIONS. –A covered class action is described in this clause if it involves –

"(I) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively

from or to holders of equity securities of the issuer; or

"(II) any recommendation, position, or other communication with respect to the sale of securities of an issuer that –

"(aa) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

"(bb) concerns decisions of such equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

"(B) STATE ACTIONS. –

"(i) IN GENERAL. – Notwithstanding any other provision of this subsection, nothing in this subsection may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

"(ii) STATE PENSION PLAN DEFINED. – For purposes of this subparagraph, the term 'State pension plan' means a pension plan established and maintained for its employees by the government of a State or political subdivision thereof, or by any agency or instrumentality thereof.

"(C) ACTIONS UNDER CONTRACTUAL AGREEMENTS BETWEEN ISSUERS AND INDENTURE TRUSTEES. – Notwithstanding paragraph (1) or (2), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State

or Federal court by a party to the agreement or a successor to such party.

"(D) REMAND OF REMOVED ACTIONS. – In an action that has been removed from a State court pursuant to paragraph (2), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

"(4) PRESERVATION OF STATE JURISDICTION. – The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

"(5) DEFINITIONS. [Applicability.] – For purposes of this subsection, the following definitions shall apply:

"(A) AFFILIATE OF THE ISSUER. – The term 'affiliate of the issuer' means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

"(B) COVERED CLASS ACTION. – The term 'covered class action' means –

"(i) any single lawsuit in which –

"(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

"(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact

common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

"(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

"(I) damages are sought on behalf of more than 50 persons; and

"(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

"(C) EXCEPTION FOR DERIVATIVE ACTIONS. –Notwithstanding subparagraph (B), the term 'covered class action' does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

"(D) COUNTING OF CERTAIN CLASS MEMBERS. –For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

"(E) COVERED SECURITY. –The term 'covered security' means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) of the Securities Act of 1933, at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under the Securities Act of 1933 pursuant to rules issued by the Commission under section 4(2) of that Act.

"(F) RULE OF CONSTRUCTION. – Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.".

(2) CIRCUMVENTION OF STAY OF DISCOVERY. – Section 21D(b)(3) of the Securities Exchange Act of 1934 (15 U.S.C. 78u-4(b)(3)) is amended by adding at the end the following new subparagraph:

"(D) CIRCUMVENTION OF STAY OF DISCOVERY. – Upon a proper showing, a court may stay discovery proceedings in any private action in a State court, as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this paragraph.".

(c) APPLICABILITY. [15 USC 77p note.] – The amendments made by this section shall not affect or apply to any action commenced before and pending on the date of enactment of this Act.

SEC. 102. PROMOTION OF RECIPROCAL SUBPOENA ENFORCEMENT. [15 USC 78u note.]

(a) COMMISSION ACTION. – The Securities and Exchange Commission, in consultation with State securities commissions (or any agencies or offices performing like functions), shall seek to encourage the adoption of State laws providing for reciprocal enforcement by State securities commissions of subpoenas issued by another State securities commission seeking to compel persons to attend, testify in, or produce documents or records in connection with an action or investigation by a State securities commission of an alleged violation of State securities laws.

(b) REPORT. [Deadline] – Not later than 24 months after the date of enactment of this Act, the Securities and Exchange Commission (hereafter in this section referred to as the "Commission") shall submit a report to the Congress –

(1) identifying the States that have adopted laws described in subsection (a);

(2) describing the actions undertaken by the Commission and State securities commissions to promote the adoption of such laws; and

(3) identifying any further actions that the Commission recommends for such purposes.

TITLE II – REAUTHORIZATION OF THE SECURITIES AND EXCHANGE COMMISSION SEC. 201. AUTHORIZATION OF APPROPRIATIONS.

Section 35 of the Securities Exchange Act of 1934 (15 U.S.C. 78kk) is amended to read as follows:

"SEC. 35. AUTHORIZATION OF APPROPRIATIONS.

"(a) IN GENERAL. – In addition to any other funds authorized to be appropriated to the Commission, there are authorized to be appropriated to carry out the functions, powers, and duties of the Commission, $351,280,000 for fiscal year 1999.

"(b) MISCELLANEOUS EXPENSES. – Funds appropriated pursuant to this section are authorized to be expended –

"(1) not to exceed $3,000 per fiscal year, for official reception and representation expenses;

"(2) not to exceed $10,000 per fiscal year, for funding a permanent secretariat for the International Organization of Securities Commissions; and

"(3) not to exceed $100,000 per fiscal year, for expenses for consultations and meetings hosted by the Commission with foreign governmental and other regulatory officials, members of their delegations, appropriate representatives, and staff to exchange views concerning developments relating to securities matters, for development and implementation of cooperation agreements concerning securities matters, and provision of technical assistance for the development of foreign securities markets, such expenses to include necessary logistic and administrative expenses and the expenses of Commission staff and foreign invitees in attendance at such consultations and meetings, including –

"(A) such incidental expenses as meals taken in the course of such attendance;

"(B) any travel or transportation to or from such meetings; and

"(C) any other related lodging or subsistence.".

SEC. 202. REQUIREMENTS FOR THE EDGAR SYSTEM.

Section 35A of the Securities Exchange Act of 1934 (15 U.S.C. 78ll) is amended –

(1) by striking subsections (a), (b), (c), and (e); and

(2) in subsection (d) –

(A) by striking "(d)";

(B) in paragraph (2), by striking "; and" at the end and inserting a period; and

(C) by striking paragraph (3).

SEC. 203. COMMISSION PROFESSIONAL ECONOMISTS.

Section 4(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78d(b)) is amended –

(1) by redesignating paragraph (2) as paragraph (3); and

(2) by inserting after paragraph (1) the following:

"(2) ECONOMISTS. –

"(A) COMMISSION AUTHORITY. – Notwithstanding the provisions of chapter 51 of title 5, United States Code, the Commission is authorized –

"(i) to establish its own criteria for the selection of such professional economists as the Commission deems necessary to carry out the work of the Commission;

"(ii) to appoint directly such professional economists as the Commission deems qualified; and

"(iii) to fix and adjust the compensation of any professional economist appointed under this paragraph, without regard to the provisions of chapter 54 of title 5, United States Code, or subchapters II, III, or VIII of chapter 53, of title 5, United States Code.

"(B) LIMITATION ON COMPENSATION. – No base compensation fixed for an economist under this paragraph may exceed the pay for Level IV of the Executive Schedule, and no payments to an economist appointed under this paragraph shall exceed the limitation on certain payments in section 5307 of title 5, United States Code.

"(C) OTHER BENEFITS. – All professional economists appointed under this paragraph shall remain within the

existing civil service system with respect to employee benefits.".

TITLE III—CLERICAL AND TECHNICAL AMENDMENTS

SEC. 301. CLERICAL AND TECHNICAL AMENDMENTS.

(a) SECURITIES ACT OF 1933.—The Securities Act of 1933 (15 U.S.C. 77 et seq.) is amended as follows:

(1) Section 2(a)(15)(i) (15 U.S.C. 77b(a)(15)(i)) is amended —

(A) by striking "3(a)(2) of the Act" and inserting "3(a)(2)"; and

(B) by striking "section 2(13) of the Act" and inserting "paragraph (13) of this subsection".

(2) Section 11(f)(2)(A) (15 U.S.C. 77k(f)(2)(A)) is amended by striking "section 38" and inserting "section 21D(f)".

(3) Section 13 (15 U.S.C. 77m) is amended —

(A) by striking "section 12(2)" each place it appears and inserting "section 12(a)(2)"; and

(B) by striking "section 12(1)" each place it appears and inserting "section 12(a)(1)".

(4) Section 18 (15 U.S.C. 77r) is amended —

(A) in subsection (b)(1)(A), by inserting ", or authorized for listing," after "Exchange, or listed";

(B) in subsection (c)(2)(B)(i), by striking "Capital Markets Efficiency Act of 1996" and inserting "National Securities Markets Improvement Act of 1996";

(C) in subsection (c)(2)(C)(i), by striking "Market" and inserting "Markets";

(D) in subsection (d)(1)(A) —

(i) by striking "section 2(10)" and inserting "section 2(a)(10)"; and

(ii) by striking "subparagraphs (A) and (B)" and inserting "subparagraphs (a) and (b)";

(E) in subsection (d)(2), by striking "Securities Amendments Act of 1996" and inserting "National Securities Markets Improvement Act of 1996"; and

(F) in subsection (d)(4), by striking "For purposes of this paragraph, the" and inserting "The".

(5) Sections 27, 27A, and 28 (15 U.S.C. 77z-1, 77z-2, 77z-3) are transferred to appear after section 26, in that order.

(6) Paragraph (28) of schedule A of such Act (15 U.S.C. 77aa(28)) is amended by striking "identic" and inserting "identical".

(b) SECURITIES EXCHANGE ACT OF 1934. —The Securities Exchange Act of 1934 (15 U.S.C. 78 et seq.) is amended as follows:

(1) Section 3(a)(10) (15 U.S.C. 78c(a)(10)) is amended by striking "deposit, for" and inserting "deposit for".

(2) Section 3(a)(12)(A)(vi) (15 U.S.C. 78c(a)(12)(A)(vi)) is amended by moving the margin 2 em spaces to the left.

(3) Section 3(a)(22)(A) (15 U.S.C. 78c(a)(22)(A)) is amended —

(A) by striking "section 3(h)" and inserting "section 3"; and

(B) by striking "section 3(t)" and inserting "section 3".

(4) Section 3(a)(39)(B)(i) (15 U.S.C. 78c(a)(39)(B)(i)) is amended by striking "an order to the Commission" and inserting "an order of the Commission".

(5) The following sections are each amended by striking "Federal Reserve Board" and inserting "Board of Governors of the Federal Reserve System": subsections

(a) and (b) of section 7 (15 U.S.C. 78g (a), (b)); section 17(g) (15 U.S.C. 78q(g)); and section 26 (15 U.S.C. 78z).

(6) The heading of subsection (d) of section 7 (15 U.S.C. 78g(d)) is amended by striking "EXCEPTION" and inserting "EXCEPTIONS".

(7) Section 14(g)(4) (15 U.S.C. 78n(g)(4)) is amended by striking "consolidation sale," and inserting "consolidation, sale,".

(8) Section 15 (15 U.S.C. 78o) is amended –

(A) in subsection (c)(8), by moving the margin 2 em spaces to the left;

(B) in subsection (h)(2), by striking "affecting" and inserting "effecting";

(C) in subsection (h)(3)(A)(i)(II)(bb), by inserting "or" after the semicolon;

(D) in subsection (h)(3)(A)(ii)(I), by striking "maintains" and inserting "maintained";

(E) in subsection (h)(3)(B)(ii), by striking "association" and inserting "associated".

(9) Section 15B(c)(4) (15 U.S.C. 78o-4(c)(4)) is amended by striking "convicted by any offense" and inserting "convicted of any offense".

(10) Section 15C(f)(5) (15 U.S.C. 78o-5(f)(5)) is amended by striking "any person or class or persons" and inserting "any person or class of persons".

(11) Section 19(c)(5) (15 U.S.C. 78s(c)(5)) is amended by moving the margin 2 em spaces to the right.

(12) Section 20 (15 U.S.C. 78t) is amended by redesignating subsection (f) as subsection (e).

(13) Section 21D (15 U.S.C. 78u-4) is amended –

(A) in subsection (g)(2)(B)(i), by striking "paragraph (1)" and inserting "subparagraph (A)".

(B) by redesignating subsection (g) as subsection (f); and

(14) Section 31(a) (15 U.S.C. 78ee(a)) is amended by striking "this subsection" and inserting "this section".

(c) INVESTMENT COMPANY ACT OF 1940.—The Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) is amended as follows:

(1) Section 2(a)(8) (15 U.S.C. 80a-2(a)(8)) is amended by striking "Unitde" and inserting "United".

(2) Section 3(b) (15 U.S.C. 80a-3(b)) is amended by striking "paragraph (3) of subsection (a)" and inserting "paragraph (1)(C) of subsection (a)".

(3) Section 12(d)(1)(G)(i)(III)(bb) (15 U.S.C. 80a-12(d)(1)(G)(i)(III)(bb)) is amended by striking "the acquired fund" and inserting "the acquired company".

(4) Section 18(e)(2) (15 U.S.C. 80a-18(e)(2)) is amended by striking "subsection (e)(2)" and inserting "paragraph (1) of this subsection".

(5) Section 30 (15 U.S.C. 80a-29) is amended —

(A) by inserting "and" after the semicolon at the end of subsection (b)(1);

(B) in subsection (e), by striking "semi-annually" and inserting "semiannually"; and

(C) by redesignating subsections (g) and (h), as added by section 508(g) of the National Securities Markets Improvement Act of 1996, as subsections (i) and (j), respectively.

(6) Section 31(f) (15 U.S.C. 80a-30(f)) is amended by striking "subsection (c)" and inserting "subsection (e)".

(d) INVESTMENT ADVISERS ACT OF 1940.—The Investment Advisers Act of 1940 (15 U.S.C. 80b et seq.) is amended as follows:

(1) Section 203(e)(8)(B) (15 U.S.C. 80b-3(e)(8)(B)) is amended by inserting "or" after the semicolon.

(2) Section 222(b)(2) (15 U.S.C. 80b-18a(b)(2)) is amended by striking "principle" and inserting "principal".

(e) TRUST INDENTURE ACT OF 1939.—The Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.) is amended as follows:

(1) Section 303 (15 U.S.C. 77ccc) is amended by striking "section 2" each place it appears in paragraphs (2) and (3) and inserting "section 2(a)".

(2) Section 304(a)(4)(A) (15 U.S.C. 77ddd(a)(4)(A)) is amended by striking "(14) of subsection" and inserting "(13) of section".

(3) Section 313(a) (15 U.S.C. 77mmm(a)) is amended —

(A) by inserting "any change to" after the paragraph designation at the beginning of paragraph (4); and

(B) by striking "any change to" in paragraph (6).

(4) Section 319(b) (15 U.S.C. 77sss(b)) is amended by striking "the Federal Register Act" and inserting "chapter 15 of title 44, United States Code,".

SEC. 302. EXEMPTION OF SECURITIES ISSUED IN CONNECTION WITH CERTAIN STATE HEARINGS.

Section 18(b)(4)(C) of the Securities Act of 1933 (15 U.S.C. 77r(b)(4)(C)) is amended by striking "paragraph (4) or (11)" and inserting "paragraph (4), (10), or (11)".

Approved November 3, 1998.

APPENDIX E

15 U.S.C. § 77p – Additional remedies; limitation on remedies

(a) Remedies additional

Except as provided in subsection (b) of this section, the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(b) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(c) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section.

(d) Preservation of certain actions

(1) Actions under State law of State of incorporation

(A) Actions preserved

Notwithstanding subsection (b) or (c) of this section, a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions

A covered class action is described in this subparagraph if it involves –

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that –

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(2) State actions

(A) In general

Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political

subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) "State pension plan" defined

For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding subsection (b) or (c) of this section, a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(4) Remand of removed actions

In an action that has been removed from a State court pursuant to subsection (c) of this section, if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(e) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) Definitions

For purposes of this section, the following definitions shall apply:

(1) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) Covered class action

(A) In general

The term "covered class action" means –

(i) any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) Exception for derivative actions

Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 77r(b) of this title at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this subchapter pursuant to rules issued by the Commission under section 77d(2) of this title.

APPENDIX F

15 U.S.C. § 1441 — Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the

place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

APPENDIX G

[*The Wall Street Journal*, July 17, 2001, at p. C23]

Prudential Limits Brokers' B-Share Sales

FUND
TRACK

By AARON LUCCHETTI

Staff Reporter of THE WALL STREET JOURNAL

In a move likely to highlight the dilemma of which mutual-fund share classés are appropriate for different investors, Prudential Securities Inc. has instructed its brokers to limit sales of "B-share" mutual funds to clients investing $100,000 or less in a single fund. The decision, which took effect this month, follows regulatory scrutiny of brokers who steered wealthy clients to B-share mutual funds when other share classes would have offered cost savings. The policy at Prudential, a unit of Prudential Insurance Co. of America in Newark, N.J., affects its 6,500 brokers as well as insurance agents who sell mutual funds at a separate Prudential subsidiary.

"In most cases, we found that it's better for the client economically," to buy A-class shares when investing more than $100,000, Prudential spokeswoman Susan Atran said. Before this month, managers at Prudential branch offices decided on their own which share class to sell to investors. Now, while branch offices may still sell B shares to wealthier mutual-fund clients, they will have to show the "transaction is economically in the best interest of the client," Ms. Atran said.

Mutual-fund share classes are essentially different pricing packages for entry into a fund, With so-called A

shares, investors pay an up front charge - usually 3% to 6% of assets. When buying B shares, investors usually pay a charge upon exiting the fund, as well as a higher annual fee. The issue has grown in importance as a higher percentage of mutual funds are bought through advisers and brokers who charge some kind of commission in addition to the fund's annual management fee.

For most mutual-fund investors, deciding between A shares and B shares is a difficult decision that has to do in part with how long they plan to hold the fund. Giving up money at the start is painful for many, but a higher annual fee can hurt performance during the long run. "I don't think there's a simple answer on the face of it," said Geoffrey Bobroff, a fund consultant in East Greenwich, R.I. "It really turns on your belief as to where the markets are going."

With wealthier clients, however, mutual funds often reduce or waive the upfront sales charge on A shares, making them a lower-cost alternative to B shares. In April, the National Association of Securities Dealers' regulatory arm levied a fine on St. Louis brokerage firm Stifel, Nicolaus & Co., alleging that one of its brokers erroneously advised customers to buy 13 shares instead of A shares. Without admitting or denying the allegations, Stifel agreed to ex-change the customers' Class B shares for Class A at no charge.

While some mutual-fund companies limit the amount allowed to flow into B shares, often at $250,000, Prudential is among the first in the brokerage industry to add its own rules. "It's another layer of supervision," said Prudential's Ms. Atran.

Merrill Lynch, the nation's largest brokerage firm in terms of registered representatives, hasn't put a dollar restriction on B shares. But a spokesman said yesterday that the New York company "continues to take suitability issues very seriously. They're a prime concern in terms of the distribution of different classes of mutual funds shares." He

added that brokers are trained and educated about which mutual-fund shares are appropriate to sell to different clients in different situations.

For investors who buy and sell their funds rapidly, a third share class, often called C shares, makes sense because they usually don't charge a commission on either the purchase or sale of the fund. But these "level load" funds often have higher continuing, annual expenses, which makes them a worse deal for buy-and-hold investors. Proponents of A shares say they are a good idea for long-term investors since they usually have the lowest annual expenses, but B shares often convert to A shares after they are held by the investor for several years.

APPENDIX H

[*The New York Times*, March 12, 2003, at p. C17]

Most Fund Brokers in Study Failed to Give Full Discounts

By FLOYD NORRIS

An examination of 43 brokerage firms found that all but 2 had overcharged at least some customers who were eligible for discounts on the purchases of mutual funds, regulators said yesterday. Over all, almost a third of customers who were eligible were overcharged.

The regulators said that some disciplinary actions were possible but added that in many cases the problems appeared to have stemmed from inadequate procedures at brokerage firms rather than an intent to overcharge customers.

"Over all, we thought it was more sloppiness than intentional," said Lori Richards, the director of the Securities and Exchange Commission's office of compliance inspections and examinations.

The discounts related to the sale of mutual funds that charge sales commissions, known in the fund industry as loads.

Most load funds offer lower commissions to investors who exceed certain "break points" by investing more money in their funds.

Different fund families have different break points and different policies on other issues, including what family accounts can be consolidated for purposes of calculating them and whether investors can get a lower rate by signing a letter of intent, promising to invest a certain amount in a group of funds over the next year or 13 months.

The inquiry by the S.E.C., NASD and the New York Stock Exchange was conducted from November to January

and looked at more than 9,000 mutual fund transactions at the 43 firms. It chose transactions in which miscalculations seemed possible and discovered 5,515 transactions that appeared to be eligible for reduced sales charges. Of those, 1,757 did not receive a discount or received one that was smaller than deserved. That came to 32 percent of the transactions that were eligible.

The discounts not provided ranged from $2 to $10,289 and averaged $364 for each transaction. While two firms provided all the discounts that were required, three others did not provide any of them. The regulators did not identify the firms but said they would be required to refund overcharges. All firms that sell load mutual funds will also be required to review their records.

Mary Schapiro, NASD's vice chairwoman, said errors were far more likely at firms that process orders electronically rather than use paper forms. "This has become an incredibly complex business, with volume discounts and linkages of various accounts, and technology in many firms did not keep up with it," she said.

In some cases, the regulators found instances of investors missing out on commission discounts they might have been eligible for had they received better advice. Some investors bought almost enough shares to receive a discount, raising the question of whether the broker had informed them of the savings available if they had invested a little more. In other cases, customers were sold several similar funds, like several high-yield bond funds, when they would have paid significantly lower commissions had they put the entire investment in one fund.

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No. 02-1520

In The Supreme Court of the United States

CHARLES H. BEHLEN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

MERRILL LYNCH & CO., INC., AND PHOENIX INVESTMENT PARTNERS, LTD., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT PHOENIX INVESTMENT PARTNERS, LTD. IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented in this appeal are: (1) Did the district court have removal jurisdiction over Petitioner's claims; (2) Did the district court properly determine that all of Petitioner's class claims were subject to dismissal under SLUSA; and (3) Did the district court correctly dismiss Petitioner's class claims with prejudice.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Court, Respondent Phoenix Investment Partners, Ltd. states the following: Phoenix Investment Partners, Ltd. is an indirect wholly owned subsidiary of The Phoenix Companies, Inc., a publicly traded company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Course of the Proceedings	1
B. Statement of Facts	3
SUMMARY OF ARGUMENT	3
REASONS FOR DENYING THE WRIT	4
A. The Eleventh Circuit's Ruling does not conflict with *Falkowski v. Imation Corp*	4
B. The Eleventh Circuit's Ruling does not conflict with any recent decision of this Court	5
C. The Eleventh Circuit correctly held that removal jurisdiction was properly exercised by the district court	7
D. The Eleventh Circuit correctly held that Petitioner's state law class claims were preempted by SLUSA and, therefore, were properly dismissed with prejudice	8
CONCLUSION	9

TABLE OF CITED AUTHORITIES

Page

CASES

Behlen v. Merrill Lynch, 311 F.3d 1087 (11th Cir. 2002) 2, 7, 8

Breuer v. Jim's Concrete of Brevard, Inc., 292 F.3d 1308 (11th Cir. 2002) 6, 7

Falkowski v. Imation Corp., 309 F.3d 1123 (9th Cir. 2002) 4, 5

Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc., 535 U.S. 826 (2002) 6

Syngenta Crop Protection, Inc. v. Henson, 123 S. Ct. 366 (2002) 5, 6

STATUTES

15 U.S.C. § 77p 1

15 U.S.C. § 77p(c) 7

15 U.S.C. § 78bb(f) 1

15 U.S.C. § 78bb(f)(2) 7

28 U.S.C. § 1441 6

28 U.S.C. § 1441(a) 6

29 U.S.C. § 216(b) 7

STATEMENT OF THE CASE

A. Course of the Proceedings

On March 15, 2001, Petitioner commenced a civil action in the Circuit Court of Mobile County, Alabama by filing a complaint (the "Original Complaint") on behalf of himself and on behalf of "[a]ll persons or entities who purchased Class B shares from Defendants in the Phoenix-Engemann Aggressive Growth Fund and other affiliated Phoenix funds and who were eligible to purchase Class A shares in the same." Petitioner's Original Complaint asserts various state law claims, including misrepresentation and suppression, and alleges that Respondents Merrill Lynch & Co. Inc. ("Merrill Lynch") and Phoenix Investment Partners, Ltd. ("Phoenix") "negligently, recklessly or intentionally misrepresented the fact that Plaintiff and the class would be sold Class A shares when eligible for the same at reduced sales charges and commissions . . . but . . . sold to them more expensive Class B shares contrary to their representations." The Original Complaint further alleges that Respondents "suppressed the true facts concerning the repeated sale to them of Class B shares in the [Phoenix funds]."

On April 27, 2001, Respondents removed Petitioner's Original Complaint from the Circuit Court of Mobile County to the United States District Court for the Southern District of Alabama pursuant to the terms of the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §§ 77p, 78bb(f) ("SLUSA").

On April 30, 2001, Respondents filed a Motion to Dismiss Plaintiff's Original Complaint pursuant to SLUSA.

On May 14, 2001, Petitioner filed a First Amended Class Action Complaint (hereinafter "Amended Complaint") with the district court, which purports to remove the claims of misrepresentation and suppression, and which deletes all explicit references to any alleged fraudulent conduct on the part of Respondents.

On June 1, 2001, Respondents filed a Motion to Dismiss Plaintiff's Amended Complaint. On June 1, 2001, Petitioner filed a Motion to Remand.

On August 27, 2001, the district court entered a Memorandum Opinion and Order (the "Order") refusing to remand this case to state court, dismissing the Petitioner's individual claims without prejudice, and dismissing Petitioner's class claims with prejudice. (Pet. App. at A20-A28). Thereafter, Petitioner filed a Motion to Alter or Amend Judgment which was denied by the district court on October 25, 2001.

On November 15, 2001, Petitioner filed an appeal of the dismissal of his claims in the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit Court of Appeals denied Petitioner's appeal in its decision dated November 8, 2002. *Behlen v. Merrill Lynch*, 311 F.3d 1087 (11th Cir. 2002) (Pet. App. at A1-A17). Petitioner then filed a Petition for Rehearing En Banc on November 27, 2002, which was denied on January 13, 2003. (Pet. App. at A18-A19).

Petitioner now seeks review of the decision of the Eleventh Circuit Court of Appeals which affirmed that the present action was removable to the district court and that the district court properly dismissed Petitioner's class claims with prejudice under SLUSA.

B. Statement of Facts

The operative facts, for purposes of these proceedings, are as follows. From November 1999 through March 2000, Petitioner purchased shares in Phoenix mutual funds through his Merrill Lynch broker. In March 2001, Petitioner filed a lawsuit against Respondents in state court, both on an individual basis and on behalf of a class of similarly situated persons. Petitioner alleges that Respondents engaged in wrongful conduct (including misrepresentations, omissions, and deception) in connection with the sale of Class B shares. Petitioner alleges that he and the class were entitled to purchase less expensive shares in the Phoenix funds.

SUMMARY OF ARGUMENT

No conflict exists between the Ninth and Eleventh Circuits concerning the preemptive scope of SLUSA. The Ninth Circuit case cited by Petitioner provides no support for the proposition that a claim framed as a breach of contract cannot be preempted by SLUSA.

No decision of this Court, recent or otherwise, conflicts with the ruling of the Eleventh Circuit in this case. The case cited by Petitioner, *Breuer v. Jim's Concrete of Brevard, Inc.*, No. 02-337, has not yet been decided by this Court, and, moreover, involves the Fair Labor Standards Act and an entirely different procedural issue.

The Eleventh Circuit correctly held that the district court properly exercised removal jurisdiction over the case

and that all of Petitioner's state law claims were preempted by and, thus, subject to dismissal with prejudice under SLUSA.

REASONS FOR DENYING THE WRIT

A. The Eleventh Circuit's Ruling does not conflict with *Falkowski v. Imation Corp.*

Petitioner has attempted to "red flag" this case by asserting that a conflict exists between the Eleventh Circuit's decision in this case and the Ninth Circuit's decision in *Falkowski v. Imation Corp.*, 309 F.3d 1123 (9th Cir. 2002). There is no conflict.

In *Falkowski*, the plaintiffs filed a class action lawsuit in state court asserting state law fraud claims relating to the exercising of stock options and breach of contract claims relating to the acceleration/termination of multiple stock option agreements. *Id.* at 1126-27. The district court held that the plaintiffs' fraud claims were preempted by SLUSA and dismissed the breach of contract claims because "the contracts on their face foreclosed the breach of contract claims. . . . " *Id.* at 1127. The district court apparently did not hold that plaintiffs' breach of contract claims were preempted by SLUSA. The breach of contract claims were dismissed without leave to amend because the district court determined that they were barred by the terms of the contracts themselves. *Id.* The Ninth Circuit held that the case was properly removed and that the district court correctly dismissed the plaintiffs' state law fraud claims because they were preempted by SLUSA. *Id.* at 1131. While the Ninth Circuit did reverse the dismissal

of the breach of contract claims, the reversal had absolutely nothing to do with the scope of preemption under SLUSA. The Ninth Circuit simply held that the district court had overstepped its bounds in ruling on a motion to dismiss by holding that the contracts, by their unambiguous terms, barred the claims. *Id.* at 1131-32. *Falkowski* does not address how or whether the state law breach of contract claims were related to the fraud claims and nowhere indicates that state law breach of contract claims can never be subject to preemption under SLUSA. Indeed, *Falkowski* gives no indication that the harm allegedly suffered by the plaintiffs from the breach of contract and fraud claims was the same. On the contrary, in *Falkowski*, the breach of contract claims concerned the acceleration and termination of the options while the fraud claims stemmed from options-related misrepresentations which occurred at an earlier date in connection with the plaintiffs' decision to accept employment. *Falkowski*, therefore, is clearly distinguishable from the case below. As both the district court and the Eleventh Circuit have clearly stated, Petitioner's claims all arise from the same alleged transaction in which he claims he was "wrongfully induced" to purchase securities.

B. The Eleventh Circuit's Ruling does not conflict with any recent decision of this Court

Although Petitioner asserts that the Eleventh Circuit's ruling in this case is in conflict with a "recent" decision of this Court (*see* Pet. at 10-14), Respondent cannot identify the allegedly conflicting case. Petitioner references only two recent decisions of this Court – *Syngenta Crop Protection, Inc. v. Henson*, 123 S. Ct. 366,

370-71 (2002) and *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002). *Syngenta Crop Protection* concerns removal under the All Writs Act, is not a securities case, and contains no reference to SLUSA. In *Holmes Group*, the Court addressed the correct venue for the appeal of patent-related cases and held that federal appellate jurisdiction could not be based upon a patent-related counterclaim. *Holmes* is not a SLUSA case and does not involve a statute, like SLUSA, which expressly provides for removal of a particular class of claims.

Petitioner does discuss a Fair Labor Standards Act ("FLSA") case from the Eleventh Circuit, *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308 (11th Cir. 2002), in which this Court has granted a petition for writ of certiorari. However, the Court has rendered no decision in *Breuer*. Therefore, the Eleventh Circuit ruling in this case cannot currently be in "conflict" with this Court's decision in *Breuer*. *Breuer* is inapposite in any event.

Breuer is an FLSA case, not a SLUSA case. In *Breuer*, the plaintiff argued that the FLSA provision which states that an action under the statute "may be maintained" in any state or federal court of competent jurisdiction expressly prohibits removal to federal court because the word "maintain" in that context should properly be construed as meaning "prosecute . . . to final judgment in the chosen forum." *Id.* at 1308-09. 28 U.S.C. § 1441(a) permits removal of any case from state court which arises under a federal statute, "except as otherwise expressly provided by Act of Congress." The Eleventh Circuit affirmed the district court's denial of the plaintiff's motion to remand and held that the FLSA did not contain language expressly prohibiting removal under 28 U.S.C. § 1441. *Id.* at 1310. In the instant case, the subject statute actually authorizes

removal: "**Removal of covered class actions** – Any covered class action brought in any State court involving a covered security . . . shall be removable to the Federal district court for the district in which the action is pending." 15 U.S.C. § 77p(c); *see also* 15 U.S.C. § 78bb(f)(2). Even if this Court does reverse *Breuer*, the decision would have no impact upon the continuing validity of the Eleventh Circuit's holding in this case. The relevant statutory language in SLUSA is prohibitory: "*No* covered class action . . . may be maintained in any State or Federal Court. . . . " 15 U.S.C. § 77p(c) (emphasis added); *see also* 15 U.S.C. § 78bb(f)(2). The language from the FLSA is permissive: "may be maintained." 29 U.S.C. § 216(b). Further, the FLSA, unlike SLUSA which expressly authorizes removal, is silent with respect to removal.

C. The Eleventh Circuit correctly held that removal jurisdiction was properly exercised by the district court

The Eleventh Circuit correctly held that "prospective class actions" are "covered class actions" under SLUSA and, thus, "are removable to federal court even if the state court has not determined whether the action should go forward as a class action." *Behlen*, 311 F.3d at 1092-93 (Pet. App. at A10) (construing 15 U.S.C. §§ 77p(f)(2)(A)(i)(I) and, 78bb(f)(5)(B)(i)(I)). Nothing in the language of SLUSA suggests that class certification prior to removal is required. *Id.* (Pet. App. at A11). Further, Petitioner's argument that a case must be "certified as a class action" prior to removal is, as stated by the Eleventh Circuit, "contrary to the stated objective of SLUSA" – that is, "[t]o enable securities defendants to obtain early dismissal of frivolous

class actions, and thereby avoid the high expense of discovery." *Id.* at 1093.

D. The Eleventh Circuit correctly held that Petitioner's state law class claims were preempted by SLUSA and, therefore, were properly dismissed with prejudice

The Eleventh Circuit correctly held that, once a case is determined to have been properly removed (*i.e.*, the state law claims have been determined to be preempted by SLUSA), SLUSA requires that the case be dismissed. *Behlen*, 311 F.3d at 1095 (Pet. App. at A15). Petitioner claims that the Eleventh Circuit erred in affirming the dismissal with prejudice of what he claims are non-fraud related state law class claims. (Pet. at 7-10). Petitioner has missed, misunderstood, or ignored a critical holding made by both the district court and the Eleventh Circuit: there simply are no state law class claims in this case which do not arise from the underlying claim that he was wrongfully induced to purchase securities. Both the district court and the Eleventh Circuit held that Plaintiff's entire case (regardless of the particular cause of action asserted) hinged upon an alleged untrue statement or omission of fact. *See Behlen*, 311 F.3d at 1095 n. 6 (Pet. App. at A15); (Pet. App. at A24-26). Consequently, the district court properly dismissed all of the class claims with prejudice because Petitioner could not recover on any state law claim alleging that he was "wrongfully induced" to purchase Class B shares. *Id.*

CONCLUSION

For all of the foregoing reasons,[1] Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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[1] Respondent Phoenix also adopts as its own and incorporates by reference, as though fully set forth herein, the Reasons for Denying the Petition in the Brief for Respondent Merrill Lynch & Co., Inc. in Opposition.

Supreme Court, U.S.
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No. 02-1520

IN THE
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CHARLES H. BEHLEN, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

MERRILL LYNCH & CO., INC., AND
PHOENIX INVESTMENT PARTNERS, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT MERRILL LYNCH & CO., INC., IN OPPOSITION

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May 16, 2003

QUESTIONS PRESENTED

The Securities Litigation Uniform Standards Act of 1998 ("SLUSA") requires dismissal of any state statutory or common-law class action alleging "an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security," 15 U.S.C. § 77p(b)(1), and also permits removal of any covered class action to federal court from state court, *id.* § 77p(c). In the decision below, the Eleventh Circuit affirmed the dismissal of plaintiff's state-law class action complaint pursuant to SLUSA. The issues raised in the petition for a writ of certiorari are:

1. Whether state-law causes of action are subject to dismissal under SLUSA when they involve an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security.

2. Whether, consistent with 15 U.S.C. § 77p(c)'s express removal authorization, defendants may remove to federal court a state-law suit for securities fraud.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Merrill Lynch & Co., Inc., states the following:

Merrill Lynch & Co., Inc., a Delaware corporation, has no parent company, and no publicly owned company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT 3

REASONS FOR DENYING THE PETITION 8

I. THE PETITION DOES NOT DEMONSTRATE ANY CONFLICT AMONG THE CIRCUITS ON WHETHER SLUSA REQUIRES DISMISSAL OF CLAIMS THAT DO NOT CONCERN WRONGDOING "IN CONNECTION WITH" THE SALE OF A COVERED SECURITY 9

A. The Court Of Appeals Correctly Ruled That SLUSA Requires Dismissal Of Petitioner's Claims 9

B. The Decision Below Does Not Conflict With The Ninth Circuit's Decision In *Falkowski* 10

C. Petitioner's Challenge Collapses Into A Plea For Error Correction Of The Eleventh Circuit's Conclusion That All Of His Claims Involve Wrongdoing "In Connection With" The Sale Of A Covered Security 12

II. THE CASE WAS REMOVABLE TO FEDERAL COURT UNDER SLUSA 14

A. The Text And Purposes Of SLUSA Support Removal 14

B. Neither This Court's Impending Decision In *Breuer* Nor Its Recent Decision In *Holmes Group* Should Affect The Proper Disposition Of This Case 16

CONCLUSION 20

TABLE OF AUTHORITIES

CASES — Page

Dudek v. Prudential Secs., Inc., 295 F.3d 875 (8th Cir. 2002) 12, 13

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 13

Falkowski v. Imation Corp., 309 F.3d 1123 (2002), *opinion amended*, 320 F.3d 905 (9th Cir. 2003) ..... *passim*

Feitelberg v. Merrill Lynch & Co., 234 F. Supp. 2d 1043 (N.D. Cal. 2002) 15

Green v. Ameritrade, Inc., 279 F.3d 590 (8th Cir. 2002) 5, 10, 11

Hardy v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 01 Civ. 5973, 2001 WL 1524471 (S.D.N.Y. Nov. 30, 2001) 15

Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826 (2002) 16, 19, 20

Lander v. Hartford Life & Annuity Ins. Co., 251 F.3d 101 (2d Cir. 2001) 3

Prager v. Knight/Trimark Group, Inc., 124 F. Supp. 2d 229 (D.N.J. 2000) 15

Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 292 F.3d 1334 (11th Cir.), *cert. denied*, 123 S. Ct. 395 (2002) 17

Zoren v. Genesis Energy, L.P., 195 F. Supp. 2d 598 (D. Del. 2002) 13

STATUTES

Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.* 2, 8, 18

29 U.S.C. § 216(b) 18

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 2

15 U.S.C. § 77z-1 ..... 2, 3

15 U.S.C. § 78u-4 ..... 2, 3

Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 1

§ 2(1)-(3), 112 Stat. 3227, reprinted at 15 U.S.C. § 78a note 3

§ 2(5), 112 Stat. 3227, reprinted at 15 U.S.C. § 78a note 3

15 U.S.C. § 77p 1

15 U.S.C. § 77p(b) ..... *passim*

15 U.S.C. § 77p(b)(1) 1, 9

15 U.S.C. § 77p(c) ..... *passim*

15 U.S.C. § 77p(f)(2)(A)(i) 5

15 U.S.C. § 77p(f)(2)(A)(i)(I) 7, 10, 15

15 U.S.C. § 77p(f)(2)(A)(i)(II) 15

15 U.S.C. § 77r(b)(2) 5

15 U.S.C. § 77v 18

15 U.S.C. § 78bb 1

15 U.S.C. § 78bb(f)(1) 4

15 U.S.C. § 78bb(f)(2) 4

15 U.S.C. § 78bb(f)(5)(B)(i) 5

15 U.S.C. § 78bb(f)(5)(B)(i)(I) 7, 15

15 U.S.C. § 78bb(f)(5)(B)(i)(II) 15

28 U.S.C. § 1441 ..... 8, 16, 17, 18

28 U.S.C. § 1441(a) 17, 18

LEGISLATIVE MATERIALS

H.R. Conf. Rep. No. 105-803 (1998) 3

IN THE
Supreme Court of the United States

No. 02-1520

CHARLES H. BEHLEN, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

MERRILL LYNCH & CO., INC., AND
PHOENIX INVESTMENT PARTNERS, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT MERRILL LYNCH & CO., INC., IN OPPOSITION

INTRODUCTION

This case involves the routine dismissal of a state-law class-action lawsuit for securities fraud pursuant to the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227 (codified in part at 15 U.S.C. §§ 77p, 78bb), which prohibits the maintenance of any covered class action "based upon the statutory or common law of any State" by any party alleging "an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b)(1).

Petitioner Charles Behlen asserts that, if he and a class of similarly situated persons had been better informed, they would have purchased Class A shares of the Phoenix-Engemann Aggressive Growth Fund instead of the Class

B shares that they in fact purchased. He therefore brought a class action against his brokerage firm and the investment adviser of the fund for wrongful conduct (including misrepresentations and omissions) in connection with the sale of Class B, as opposed to Class A, shares.

Rather than bringing a claim for securities fraud under federal law, which would have required him to fulfill the heightened pleading standards imposed by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (codified in part at 15 U.S.C. §§ 77z-1, 78u-4), petitioner chose to pursue his class action in state court under state law. But Congress enacted SLUSA precisely to foreclose that type of end-run around the requirements of the PSLRA. Accordingly, respondents Merrill Lynch & Co., Inc. ("Merrill Lynch") and Phoenix Investment Partners, Ltd. ("Phoenix Investment") removed the case to federal court, where the district court dismissed the case in its entirety pursuant to SLUSA.

In affirming, the Eleventh Circuit did not bring itself into conflict with *Falkowski v. Imation Corp.*, 309 F.3d 1123 (2002), *opinion amended*, 320 F.3d 905 (9th Cir. 2003), as petitioner erroneously asserts. The court below did not perceive a conflict with the Ninth Circuit and there is none. *Falkowski* involved a quite distinctive situation where the state claims held to have survived SLUSA dismissal did not concern misrepresentations in connection with the sale of securities, which the court below expressly found was the case here. Petitioner also requests that this case be held for *Breuer v. Jim's Concrete of Brevard, Inc.*, No. 02-337. But that case involves a different statute, the Fair Labor Standards Act of 1938, and a different procedural issue. Further review is plainly unwarranted.

STATEMENT

1. In 1995, to curtail the filing of meritless securities fraud class actions, Congress passed the PSLRA, which instituted heightened procedural and substantive standards for private securities suits in federal courts. The PSLRA imposed heightened pleading requirements and an automatic stay of discovery pending motions to dismiss. 15 U.S.C. §§ 77z-1, 78u-4. *See also* Pet. App. A5-A6; *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107 (2d Cir. 2001).

By 1998, however, it became apparent to Congress that many class-action plaintiffs were seeking to thwart the PSLRA's heightened pleading requirements by filing frivolous securities lawsuits in state court and under state statutory or common law rather than federal law. To prevent such efforts to circumvent the PSLRA, Congress enacted SLUSA, which forecloses the option of maintaining securities class actions in state court or under state law. *See* H.R. Conf. Rep. No. 105-803, at 13-15 (1998); Pet. App. A7-A9; *Lander*, 251 F.3d at 107-08.

In enacting SLUSA, Congress expressly found that "a number of securities class action lawsuits have shifted from Federal to State courts," and that "this shift has prevented [the PSLRA] from fully achieving its objectives." SLUSA § 2(1)-(3), 112 Stat. 3227, reprinted at 15 U.S.C. § 78a note. Congress concluded that, "to prevent [these] State private securities class action lawsuits ... from being used to frustrate the objectives of the [PSLRA], it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while ... not changing the current treatment of individual lawsuits." *Id.* § 2(5), 112 Stat. 3227, reprinted at 15 U.S.C. § 78a note.

The general preemption provision of SLUSA therefore broadly precludes class actions under state law where they allege facts actionable under the federal securities laws:

> **(b) Class action limitations**
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b); *see also id.* § 78bb(f)(1). To provide a ready means for defendants to enforce that prohibition on lawsuits attempting to use state-law causes of action to evade federal restrictions, Congress provided that "[a]ny covered class action brought in any State court involving a covered security . . . shall be removable to the Federal district court for the district in which the action is pending." *Id.* § 77p(c); *see also id.* § 78bb(f)(2).

SLUSA defines "covered class action," in relevant part, as "any single lawsuit in which"

> (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or
>
> (II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members[.]

Id. §§ 77p(f)(2)(A)(i), 78bb(f)(5)(B)(i). The definition of "covered security" includes "a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940." *Id.* § 77r(b)(2).

Taken together, these SLUSA provisions authorize the removal and subsequent dismissal of (1) any "covered class action," (2) based on state law, (3) that alleges an untrue statement, omission of material fact, or deception "in connection with" the purchase or sale of (4) a "covered security." *See* Pet. App. A9; *Green v. Ameritrade, Inc.*, 279 F.3d 590, 596 (8th Cir. 2002).

2. In 1999 and 2000, petitioner purchased Class B shares in the Phoenix-Engemann Aggressive Growth Fund from respondents Merrill Lynch and Phoenix Investment. On March 15, 2001, petitioner filed a civil action in state court, on behalf of himself and a class of persons similarly situated, seeking to recover money damages resulting from the purchase of those shares. The gravamen of the complaint was that respondents sold the class members Class B shares rather than Class A shares (which the class members were eligible to purchase) because the Class B shares were subject to higher fees and commissions.

On April 27, 2001, respondents removed the case to the United States District Court for the Southern District of Alabama. *See* Pet. App. A3. When respondents thereafter moved to dismiss the complaint under SLUSA, petitioner filed an amended complaint from which he deleted the claims for misrepresentation and suppression as well as any explicit references to fraud. Petitioner argued that SLUSA was not applicable to the claims in his amended complaint and sought a remand to state court.

The district court rejected petitioner's arguments. The court observed that, although petitioner attempted to characterize his claim as concerning the overcharging of commissions rather than the sale of securities, the alleged

wrongdoing was nevertheless "in connection with" the sale of covered securities because

> the heart of Plaintiff's claim is that he did not get the shares that he now believes that he should have received. Behlen repeatedly states that he should have been purchasing Class A shares rather than the Class B shares because he could have acquired them and paid less money for fees and commissions.

Id. at A27. Accordingly, the district court denied the remand, dismissed the class claims with prejudice, and dismissed petitioner's individual claims without prejudice.

3. The Eleventh Circuit affirmed. That court agreed with the district court that the allegations in the complaint concerned misrepresentations or omissions "in connection with" the sale of securities:

> [A]lthough Behlen argues that the excess fees and commissions paid by the class members were incidental to the sale of the securities, it seems certain that the very reason they were sold the Class B shares was *because* those shares were subject to the excess fees and commissions. Thus, the fees and commissions were not incidental to the sale of the securities, but were an integral part of the transactions.

Pet. App. A14. The court of appeals also agreed that SLUSA applied to petitioner's amended complaint (despite the absence of explicit references to fraud) because all of the claims therein turned on misrepresentations, omissions, or manipulation "in connection with" the sale of covered securities:

> In the amended complaint, Behlen alleged that "Defendants wrongfully sold Plaintiff and the Class, or wrongfully allowed Plaintiff and the Class to purchase, Class B shares in a mutual fund which allowed Defendants to collect higher fees." Thus, Behlen alleged wrongful conduct "in

> connection with" the purchase of the growth fund shares. He also implicitly alleged that the defendants failed to disclose material facts about which class of shares was sold to him and the class. Because Behlen alleged in the amended complaint that the defendants misstated or omitted material facts "in connection with" the purchase and sale of the growth fund shares, it, too, fell within the scope of the SLUSA and the district court did not err when it denied Behlen's motion to remand the case to state court.

Id. at A17.

The Eleventh Circuit also rejected petitioner's argument that the case was not a covered class action because the class had not yet been certified. The court found it "clear from the statutory language that prospective class actions are removable to federal court even if the state court has not determined whether the action should go forward as a class action." *Id.* at A10 (discussing 15 U.S.C. §§ 77p(f)(2)(A)(i)(I), 78bb(f)(5)(B)(i)(I)). The court also explained that "requiring certification prior to removal would frustrate the objectives of the SLUSA rather than further them" because "SLUSA's provisions were designed to enable securities defendants to obtain early dismissal of frivolous class actions, and thereby avoid the high expense of discovery." *Id.* at A11 (internal quotation marks omitted). Petitioner's proposed rule preventing removal until the class has been certified, by contrast, would expose defendants to "lengthy and expensive pretrial practice and discovery in state court, regardless of the merits of the action." *Id.*

The Eleventh Circuit denied petitioner's en banc petition without dissent or recorded vote in favor of rehearing.

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit properly applied SLUSA to hold that petitioner's lawsuit must be dismissed in its entirety. Petitioner's assertion of a conflict between the decision below and *Falkowski v. Imation Corp.*, 309 F.3d 1123 (2002), *opinion amended*, 320 F.3d 905 (9th Cir. 2003), is incorrect. In *Falkowski*, the Ninth Circuit held that SLUSA does not require dismissal of those counts in a complaint that do *not* depend upon wrongful conduct in connection with the sale of a covered security. In the decision below, however, the Eleventh Circuit construed *all* of the claims in petitioner's complaint as involving wrongful conduct in the sale of covered securities (and thus falling within the ambit of SLUSA). To the extent petitioner challenges the Eleventh Circuit's construction of the particular allegations in his complaint, that contention does not involve an issue involving the interpretation of SLUSA, but rather an assertion that the court below misunderstood petitioner's claims. Such a fact-bound determination, however, does not warrant further review.

II. Petitioner's second issue likewise does not merit certiorari. Petitioner contends that SLUSA § 77p(b) does not provide a basis for removal jurisdiction under 28 U.S.C. § 1441. In making that argument, petitioner does not address the court of appeals' reliance on the specific provision of SLUSA that supports removal, § 77p(c). Thus, even if there were any merit to petitioner's argument, the question presented is completely academic and irrelevant. A court need not strain to construe § 77p(b) and 28 U.S.C. § 1441 in such a way as to support removal jurisdiction when § 77p(c) specifically provides for removal of actions covered by SLUSA. Nor need this petition be held for this Court's decision in *Breuer v. Jim's Concrete of Brevard, Inc.*, No. 02-337, because that case involves the very different question whether an action that may be "maintained" in state court under the Fair Labor Standards Act is subject to removal to federal court. By contrast, petitioner here asserts that SLUSA's prohibition on suits

being "maintained" under state law or in state courts does not support a conclusion of federal preemption that would support removal. Because the cases involve different statutes and different legal theories, this Court's decision in *Breuer* should have no bearing on this case.

I. THE PETITION DOES NOT DEMONSTRATE ANY CONFLICT AMONG THE CIRCUITS ON WHETHER SLUSA REQUIRES DISMISSAL OF CLAIMS THAT DO NOT CONCERN WRONGDOING "IN CONNECTION WITH" THE SALE OF A COVERED SECURITY

A. The Court Of Appeals Correctly Ruled That SLUSA Requires Dismissal Of Petitioner's Claims

Under the plain language of SLUSA, "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging . . . an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b)(1).

The Eleventh Circuit properly applied that language to hold that petitioner's lawsuit must be dismissed in its entirety. All of petitioner's claims are predicated on the theory that respondents wrongfully sold him Class B shares in the Phoenix-Engemann Aggressive Growth Fund instead of Class A shares that would have resulted in lower fees and commissions. Even after amending his complaint, the basis for petitioner's class claims was that "Defendants wrongfully sold Plaintiff and the Class, or wrongfully allowed Plaintiff and the Class to purchase, Class B shares in a mutual fund which allowed Defendants to collect higher fees." Pet. App. A17 (quoting amended complaint). Thus, as the court properly concluded, petitioner alleged wrongful conduct "'in connection with' the purchase of the growth fund shares" within the meaning of SLUSA, § 77p(b). *Id.* Dismissal of the action was therefore entirely warranted.

B. The Decision Below Does Not Conflict With The Ninth Circuit's Decision In *Falkowski*

Petitioner's contention that the decision below conflicts with *Falkowski v. Imation Corp.* has no merit.

1. In *Falkowski*, the Ninth Circuit applied SLUSA to dismiss those claims in the complaint that alleged wrongdoing "in connection with" the sale of a covered security while allowing other claims that did not involve such wrongdoing to proceed. Petitioner incorrectly characterizes the Eleventh Circuit's decision below as holding that SLUSA requires dismissal of *all* claims in a complaint, regardless of whether the claim alleges wrongdoing "in connection with" the sale of a covered security. Rather, the court determined that all of petitioner's claims in fact alleged wrongdoing in connection with the purchase or sale of a covered security and that SLUSA therefore applied to the entirety of petitioner's suit, even as amended. "It is clear," the court said, "that the crux of the complaint was that the defendants either misrepresented or omitted crucial facts about the Class A and Class B shares, thus causing [petitioner] and the class to invest in inappropriate securities." Pet. App. A13.[1] The court made that statement specifically to distinguish this case from *Green v. Ameritrade, Inc.*, 279 F.3d 590, 597 (8th Cir. 2002), which (like *Falkowski*) contained causes of action that did *not* depend upon fraud or deception "in connection with" the sale of a covered security.[2] Hence, even if the circuits

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[1] The court of appeals' conclusion that all of the claims – even the putatively non-fraud claims – must be dismissed also finds support in the definition of "covered class action," which specifies that the action be "any single lawsuit." *See* 15 U.S.C. § 77p(f)(2)(A)(i)(I). The prohibition in § 77p(b) makes clear that "[n]o covered class action . . . may be maintained in any State or Federal court." *Id.* § 77p(b). Thus, once a court determines that the definition of "covered class action" is satisfied, the prohibitions in § 77p(b) apply.

[2] Plaintiff Green had contracted with Ameritrade to receive "real time" stock quotes that turned out not to be in real time. Pet. App. A12 (citing *Green*, 279 F.3d at 593-94). Green did not claim that the delayed quotes caused him to buy or sell a covered security; instead, he

were in conflict over whether SLUSA necessarily requires dismissal of all claims in a complaint – and they are not – any such split would not be implicated by this case.

2. A comparison of the causes of action in *Falkowski* with those in this case confirms that the alleged conflict is illusory. In *Falkowski*, a group of employees that was initially employed by a company called Cemax received options on Imation stock when Imation acquired Cemax. Shortly after this merger, Imation announced a $200 million earnings write-off, which had a predictably negative effect on Imation's stock price. 309 F.3d at 1127. The employees filed a class action, claiming that Imation had induced them to maintain their employment with Cemax through the acquisition by misrepresenting the value of Imation stock and options in various respects, including concealment of the impending earnings write-off. *Id.* The Court found those claims to be barred by SLUSA. *Id.* at 1131.

Approximately one year after taking over Cemax, Imation sold Cemax to the Eastman Kodak Company. In connection with that latter sale, Imation gave the employees 30 days to exercise their vested options; any unvested options were deemed forfeited. *Id.* at 1127. Whether Imation could, consistent with the option contracts, require the employees to exercise their options on that timetable and to forfeit their unvested options depended on whether the sale of Cemax to Kodak constituted a "termination" of their employment as defined in the Imation contracts. *Id.* The alleged harm to the employees from Imation's acceleration of the exercise of certain options and forfeiture of others was distinct from any harm that the employees may have suffered from Imation's alleged misrepresentations or omissions that induced the

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alleged that he had contracted for a service but did not receive the kind of information for which he believed he was paying. *Green*, 279 F.3d at 598-99. The Eighth Circuit held that Green's claims were not "in connection with" the sale of a covered security and therefore were not barred by SLUSA. *Id.*

employees to accept Imation options in the first place. The Ninth Circuit held that those claims were not barred by SLUSA. *Id.*

Petitioner's claims are unlike those the Ninth Circuit found in *Falkowski* to be unaffected by SLUSA. *All* of the damages claimed by petitioner can be traced to the purchase by the putative class members of Class B, rather than Class A, shares. Petitioner does not claim that respondents made any error in calculating the commissions and fees due on the putative class members' Class B shares. Rather, all of the alleged harm and all of the alleged misconduct flows directly from the fact that petitioner and his fellow putative class members own what they consider to be the wrong share class. The alleged misrepresentation in the sale of those shares is at the heart of the types of claims that Congress intended for SLUSA to cover.

C. Petitioner's Challenge Collapses Into A Plea For Error Correction Of The Eleventh Circuit's Conclusion That All Of His Claims Involve Wrongdoing "In Connection With" The Sale Of A Covered Security

The Eleventh Circuit interpreted petitioner's claims as depending upon allegations of misstatements, omissions, or deception "in connection with" the sale of a covered security (and thus subject to dismissal under SLUSA). That determination is consistent with other courts' treatment of securities fraud claims that are dressed up in non-fraud language.

Indeed, the Eleventh Circuit expressly analogized the present case to *Dudek v. Prudential Securities, Inc.*, 295 F.3d 875 (8th Cir. 2002), in which the Eighth Circuit held that SLUSA barred a class action filed in state court alleging that the defendants improperly marketed tax-deferred annuities to accounts that already enjoyed tax-deferred status. Pet. App. A13 (citing *Dudek*, 295 F.3d at 877). The harm alleged was that the defendants charged higher fees for tax-deferral characteristics in the

annuities that their customers did not need. *Dudek*, 295 F.3d at 877. In their complaint, the *Dudek* plaintiffs carefully avoided express references to fraud, misrepresentation, or omission, and claimed that their cause of action was for excessive fees rather than for misconduct in connection with the sale of securities. *Id.* at 877-78. The Eighth Circuit rejected that argument, however, and found that SLUSA barred claims grounded in the misrepresentation or omission of material fact that the plaintiffs had been sold the wrong kind of security. *Id.* at 879.

Dudek exemplifies the principle that SLUSA bars state-law class actions that may seek to avoid pleading fraud explicitly but which nevertheless rely implicitly on allegations of misrepresentation, omission, or deception in connection with the sale of a covered security. *See also, e.g.*, *Zoren v. Genesis Energy, L.P.*, 195 F. Supp. 2d 598, 604 (D. Del. 2002) ("[C]ourts interpreting SLUSA assess preemption based upon whether the complaint read as a whole sets out fraudulent misconduct, regardless of the prayer for relief."). The Eleventh Circuit invoked that consistently applied principle and determined that SLUSA barred all of petitioner's claims. To the extent that petitioner challenges the Eleventh Circuit's application of that principle to the particular counts he pleaded, he seeks only fact-bound error correction and not the articulation of a legal rule that warrants this Court's plenary review.[3]

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[3] Petitioner makes (Pet. 10) a half-hearted effort to assert a conflict with *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), but the issue there concerned whether the class had been properly constituted, and not whether the claims that class members sought to pursue were legally valid.

II. THE CASE WAS REMOVABLE TO FEDERAL COURT UNDER SLUSA

A. The Text And Purposes Of SLUSA Support Removal

1. SLUSA provides that "[a]ny covered class action brought in any State court involving a covered security . . . shall be removable to the Federal district court for the district in which the action is pending." 15 U.S.C. § 77p(c). As the court below recognized, that provision supported respondents' removal of petitioner's state-court lawsuit. *See* Pet. App. A8 n.3.[4]

Because of the clarity of § 77p(c)'s text, the parties in the courts below joined issue only on whether petitioner's lawsuit was a "covered class action," and not whether § 77p(c) fails to mean what it plainly says. Indeed, petitioner all but conceded in his reply brief in the court of appeals that § 77p(c) supports removal jurisdiction. *See* Behlen C.A. Reply Br. 12 (discussing "the uniqueness of removal under SLUSA").

The Eleventh Circuit correctly rejected petitioner's contention "that his case was not removable, because it was not a 'covered class action.'" Pet. App. A9. Petitioner had based that argument on another subsection of SLUSA, § 77p(b), which states that "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be *maintained* in any State or Federal Court." 15 U.S.C. § 77p(b) (emphasis added). Petitioner contended that "at the time of removal the case was not *maintained* as a class action, because the state court had not determined whether the case should proceed in a class-wide fashion." Pet. App. A10 (emphasis added). The Eleventh Circuit recognized that petitioner's argument

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[4] Petitioner asserts that "the Eleventh Circuit made utterly no mention of 15 U.S.C. § 77p(c)," Pet. 11, but that is plainly incorrect. In fact, the court's opinion quotes § 77p(c) in full. *See* Pet. App. A8 n.3.

> is based upon a misreading of the statute. The SLUSA does not require that an action be "maintained as a class action" before it can be removed; rather, it merely provides that no class action falling within the scope of its coverage can be maintained in a state or federal court, which means that dismissal of a "covered class action" is required.

Id. (citing *Prager v. Knight/Trimark Group, Inc.*, 124 F. Supp. 2d 229, 231 (D.N.J. 2000)).

SLUSA's definition of "covered class action" refers explicitly to actions in which "damages are sought on behalf of more than 50 persons or *prospective* class members, and questions of law or fact common to those persons or members of the *prospective* class . . . predominate," 15 U.S.C. §§ 77p(f)(2)(A)(i)(I), 78bb(f)(5)(B)(i)(I) (emphases added); *see also id.* §§ 77p(f)(2)(A)(i)(II), 78bb(f)(5)(B)(i)(II) (likewise referring to "members of the prospective class"). In view of these references, the Eleventh Circuit found the statutory language "clear" that "prospective class actions are removable to federal court even if the state court has not determined whether the action should go forward as a class action." Pet. App. A10.

2. Petitioner is unable to cite a single judicial decision holding, or even suggesting, that a prospective class action must be certified or otherwise "maintained" as a class before removal is proper under SLUSA. Rather, the opposite is true. SLUSA cases are routinely removed to federal court within only a few days or weeks after the filing of the class-action complaint in state court on the basis of the class allegations set forth in the complaint, and without any regard or reference to the class certification issue. *See, e.g., Feitelberg v. Merrill Lynch & Co.*, 234 F. Supp. 2d 1043 (N.D. Cal. 2002) (class action removed to federal court within 19 days after being filed in state court); *Hardy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 01 Civ. 5973, 2001 WL 1524471 (S.D.N.Y. Nov. 30, 2001)

(class-action complaint removed to federal court a mere 10 days after being filed in state court).

Those holdings are consistent with Congress's purposes in enacting the PSLRA and SLUSA. Congress sought in SLUSA to facilitate rapid dismissal of frivolous securities fraud class actions brought in state court in contravention of the higher pleading standards in the PSLRA, but "[r]equiring [class] certification prior to removal would entail potentially lengthy and expensive pretrial practice and discovery in state court, regardless of the merits of the action." Pet. App. A11. As the court below recognized, "such a prospect is contrary to the stated objectives of the SLUSA." *Id.*

Accordingly, petitioner's argument that his lawsuit was not "maintained" as a "covered class action" within the meaning of SLUSA, and therefore falls outside that Act's removal and preemption provisions, is without merit.

B. Neither This Court's Impending Decision In *Breuer* Nor Its Recent Decision In *Holmes Group* Should Affect The Proper Disposition Of This Case

1. Petitioner appears to be seeking a grant, vacate, and remand order from this Court on the ostensible grounds that the decision below erred in light of recent case developments in this Court. *See* Pet. 10-14 (arguing that the petition should be held for *Breuer v. Jim's Concrete of Brevard, Inc.*, No. 02-337, or reversed in light of *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002)). Those arguments rest on a fundamental mischaracterization of what the Eleventh Circuit held below, as well as a misunderstanding of the issue presented in *Breuer* and this Court's holding in *Holmes Group*.

First, there is no basis for petitioner's assertion (Pet. 10) that the Eleventh Circuit's decision below depended on an interpretation of the general federal removal statute, 28 U.S.C. § 1441, rather than on the specific removal provisions of SLUSA. The court of appeals did not address the

language of the general removal statute, but rather rested its decision that removal was proper on SLUSA: "SLUSA preempts certain state law actions, allows for removal of state actions to federal court, and requires immediate dismissal of 'covered lawsuits.'" Pet. App. A9 (citing *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1341 (11th Cir.), *cert. denied*, 123 S. Ct. 395 (2002)).[5]

Second, in view of that mischaracterization of the Eleventh Circuit's holding, petitioner proffers an argument that is irrelevant to the proper disposition of this case. Petitioner asserts that the general removal statute of 28 U.S.C. § 1441 may not be invoked in this context because "[t]he directive in SLUSA at 15 U.S.C. § 77p(b) that '[n]o covered class action based on the statutory or common law of any state . . . may be maintained in state or federal court' itself provides no basis for finding that the action may be removed as provided in § 1441." Pet. 10 (second alteration and ellipsis in original). At best, however, that question is academic, in light of SLUSA's explicit removal provision in § 77p(c). Moreover, even if a conceivable basis existed for a court to inquire into the applicability of § 1441's general removal provisions in a SLUSA case (rather than simply apply SLUSA's specific removal provision in § 77p(c)), this case would present a poor vehicle for this Court to address that question, because petitioner did not raise it below and the Eleventh Circuit did not address the issue on its own.

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[5] In *Riley*, the trustees of a profit sharing plan brought a class action in state court against the investment adviser of a registered investment company, claiming violations of state securities and unfair trade practices laws based on "material Misrepresentations and Omissions [that] induced the Plaintiffs and other Class members to *purchase and retain* shares of the Growth Fund." 292 F.3d at 1345 (alterations and emphasis in original; internal quotation marks omitted). The Eleventh Circuit held that the case was a "covered class action," *id.*, and was therefore properly removed to federal court and dismissed pursuant to SLUSA, *id.* at 1341.

2. Having artificially focused the petition on a question neither raised nor decided below, petitioner then seeks to have this case held for the Court's impending decision in *Breuer*. There is no colorable reason to hold the current petition for *Breuer*, which presents an unrelated question about removal of actions brought under the Fair Labor Standards Act ("FLSA").

The federal removal statute, 28 U.S.C. § 1441(a), provides that, "[e]xcept as otherwise expressly provided by Act of Congress," any action in state court of which the federal district courts also have jurisdiction may be removed to federal district court. The FLSA provides that an action "may be maintained against any employer . . . in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). The question presented in *Breuer* is whether an FLSA action filed in state court is subject to removal under § 1441(a). The argument being made against removal in *Breuer* is that the FLSA's language providing that an action may be "maintained" in state court amounts to an "express" prohibition on removal under § 1441. *See* Pet. Br. at 6, No. 02-337 (arguing that "[t]he phrase 'may be maintained' [in the FLSA] should fairly be understood to mean that an employee who has brought an FLSA action in state court may in that court continue that action until final judgment").

This Court's answer to that question has no bearing on the proper disposition of petitioner's case, which depends *solely* upon whether his suit is a "covered class action" within the meaning of 15 U.S.C. § 77p(b) and (c) – which it unquestionably is. *See* pp. 14-16, *supra*. Indeed, even if the decision below somehow could be read to rest on a construction of § 1441, *Breuer* would be irrelevant for the additional reason that the federal securities laws contain their own "express[] provi[sion] by Act of Congress" codified at § 77v that limits the applicability of § 1441. Whether the FLSA also has such a provision – the question raised in *Breuer* – simply has no bearing on this case.

Petitioner argues that Congress's use of the word "maintained" in both the FLSA and SLUSA suggests that *Breuer* will nonetheless be instructive to the Court's disposition of the petition. But even that similarity does not justify holding this petition until *Breuer* is decided. Petitioner's theory is that the Eleventh Circuit found removal jurisdiction based exclusively on Congress's complete preemption of state law in the field of securities class actions. *See* Pet. 12 ("Had the Eleventh Circuit not found that the 'complete pre-emption' doctrine controlled here, it would have reversed the district court's finding of removal jurisdiction."). Although petitioner asserts that *Breuer* will shed light on whether the use of the word "maintained" in the FLSA "intimate[s] that it is concerned with the issue of removal," Pet. 11, the issue in *Breuer* does not concern preemption at all, but rather whether the FLSA's provision authorizing suits to be "maintained" in both federal and state courts provides a basis for removal. Accordingly, there is no reason to think that anything this Court might say in *Breuer* about the word "maintained" under the FLSA would affect a court's analysis of SLUSA.

In any event, it is noteworthy that even the Ninth Circuit – erroneously asserted by petitioner to be in conflict with the Eleventh Circuit below – agrees that SLUSA completely preempts claims within its coverage. *See Falkowski*, 309 F.3d at 1128 ("SLUSA provides for just such complete preemption.")

3. Finally, petitioner cites *Holmes Group* for the proposition that "a perceived congressional purpose to promote uniformity in a field of law, as opposed to a text that requires it, does not justify a finding of 'complete preemption.'" Pet. 13. Petitioner's reliance on *Holmes Group* is misplaced.

First, as noted above, the decision below does *not* rest on a finding of complete preemption. Rather, it flows from the Eleventh Circuit's plainly correct determination that petitioner's lawsuit is a "covered class action" subject to removal under § 77p(c) and to dismissal under § 77p(b).

Second, the Eleventh Circuit did not base its decision merely on its perception of Congress's purposes. Instead, the court relied chiefly on the statutory text. The court ruled that "it is clear from the statutory language that prospective class actions are removable to federal court even if the state court has not determined whether the action should go forward as a class action," and that petitioner's contrary argument was based on a "misreading of the statute." Pet. App. A10.

Finally, the holding of *Holmes Group* – that appeals involving aspects of patents do not always implicate the Federal Circuit's exclusive jurisdiction over patent appeals – is quite far afield from the SLUSA issues presented here. *See* 535 U.S. at 829-30.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

CHARLES H. BEHLEN *et al.*,

Petitioner,

v.

MERRILL LYNCH & CO., INC., and
PHOENIX INVESTMENT PARTNERS, LTD. *et al.*,

Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit

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12 pp

TABLE OF CONTENTS

Table of Authorities ii

Argument 1

I. The Ninth Circuit's Decision in *Falkowski* Is in Conflict with the Eleventh Circuit's Decision in the Present Case. 1

II. The Eleventh Circuit Erroneously Concluded That There Was General Federal-Question Jurisdiction over Behlen's Complaint for Removal Purposes. 3

Conclusion 8

TABLE OF AUTHORITIES

Cases	Page
Behlen v. Merrill Lynch, 311 F.3d 1087 (11th Cir. 2002)	1-4
Breuer v. Jim's Concrete of Brevard, Inc., 123 S. Ct. 1882 (2003)	4
Falkowski v. Imation Corp., 309 F.3d 1123 (9th Cir. 2002), *opinion amended*, 320 F.3d 905 (9th Cir. 2003)	1
Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 122 S. Ct. 1889 (2002)	5

Statutes and Rules	Page
15 U.S.C. § 77p	5
15 U.S.C. § 77p(b)	2, 4-6
15 U.S.C. § 77p(b)(1)	2
15 U.S.C. § 77p(b)(2)	2
15 U.S.C. § 77p(c)	3-6
15 U.S.C. § 77v	3, 4, 6
15 U.S.C. § 77v(a)	5

28 U.S.C. § 1441 ..... 3, 4

28 U.S.C. § 1441(b) 4

28 U.S.C. § 1446 4

Private Securities Litigation
and Reform Act of 1995 6-7

Securities Litigation Uniform
Standards Act of 1998 ..... 1-3, 5-7

Fed. R. Civ. P. 23 5

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I. The Ninth Circuit's Decision in *Falkowski* Is in Conflict with the Eleventh Circuit's Decision in the Present Case.

Respondents Merrill Lynch and Phoenix Investment Partners (collectively "Merrill Lynch") contend that *Falkowski v. Imation Corp.*, 309 F.3d 1123 (9th Cir. 2002), *opinion amended*, 320 F.3d 905 (9th Cir. 2003), is not in conflict with the Eleventh Circuit's decision below because, they contend, the nature of the claims are different in *Falkowski*. Of course some factual distinctions can be made between the cases, but the nature of the claims that the Ninth Circuit found it error to dismiss and that the Eleventh Circuit found were due to be dismissed were both "garden variety state law claims . . . not preempted by federal securities laws." *Falkowski*, 309 F.3d at 1131.

The Eleventh Circuit opinion noted that "Behlen amended the complaint to remove any federal cause of action" and that Behlen removed "the allegations that would bring his claims within the scope of the SLUSA . . . ." *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1095 (11th Cir. 2002) (Pet. App. at A16-A17). The Eleventh Circuit then looked behind the allegations of Behlen's amended complaint — the allegations that "removed all explicit references to any fraudulent activity by the defendants"[1] and that "remove[d]

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[1] *Behlen*, 309 F.3d at 1090 (Pet. App. at A3).

any federal cause of action"[2] — to conclude, erroneously, that the amended complaint "still presents a federal question"[3] and "fell within the scope of the SLUSA."[4] Some of the allegations of Behlen's complaint are described and quoted in his Petition from the bottom of page 5 to the top of page 7. The "garden variety" state-law claims asserted by Behlen, such as breach of contract (as in *Falkowski*), unjust enrichment, and negligence, among others, may, as a matter of law, be proven without any proof of or reference to any "untrue statement or omission of a material fact" or "any manipulative or deceptive device or contrivance." 15 U.S.C. § 77p(b). These claims are, therefore, outside the scope of SLUSA.

Merrill Lynch contends that Behlen "seeks only fact-bound error correction," but the errors are significant legal errors concerning whether, contrary to the treatment of the non-fraud[5] state-law claims in *Falkowski*, SLUSA completely or "super" preempts Behlen's state-law class claims that, as a matter of law, may be proven without reference to any misrepresentations or suppressions of material fact and are thus outside the scope of 15 U.S.C. § 77p(b).

Thus, there exists a significant conflict between the Ninth Circuit and the Eleventh Circuit concerning treatment of "garden variety" state-law class claims alleged that are outside the parameters of 15 U.S.C. § 77p(b).

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[2] *Behlen*, 309 F.3d at 1095 (Pet. App. at A16).

[3] *Behlen*, 309 F.3d at 1095 (Pet. App. at A17).

[4] *Behlen*, 309 F.3d at 1096 (Pet. App. at A17).

[5] The term "fraud" in this context is meant to be a shorthand reference to any of the types of allegations encompassed by 15 U.S.C. § 77p(b)(1) & (b)(2).

II. The Eleventh Circuit Erroneously Concluded That There Was General Federal-Question Jurisdiction over Behlen's Complaint for Removal Purposes.

Merrill Lynch asserts that there is "no basis" to conclude that the Eleventh Circuit found that there was general federal-question jurisdiction over Behlen's complaint for removal purposes (Merrill Lynch Br. at 16), but there is actually very little reason to conclude that the decision below relied on SLUSA's removal provision, 15 U.S.C. § 77p(c). While it is true that the Eleventh Circuit does not cite to 28 U.S.C. § 1441, this must be what is contemplated by the references to "federal question jurisdiction" to uphold the removal. As noted, there is no mention of the express prohibition on removal in § 77v and no discussion of how § 77p(c) is exempted by the removal prohibition. The only reference to § 77p(c) is in footnote 3 of the opinion where the court is discussing the background of SLUSA and explaining what was added by SLUSA to the Securities Act of 1933.[6] The opinion contains no substantive discussion of § 77p(c) or any application of it to this case.

Significantly, the court stated that "[i]n the instant case, the district court had *federal question jurisdiction* over Behlen's original complaint, because the claims therein were preempted by SLUSA," and stated further that "the amended complaint still presents a *federal question*." *Behlen*, 311 F.3d at 1095 (Pet. App. at A16-A17) (emphasis added). These statements – combined with the court's discussion of the "complete pre-emption doctrine"[7] and the court's reporting that "the defendants removed the case to the

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[6] *Behlen*, 311 F.3d at 1091-92 & n.3 (Pet. App. at A8).

[7] *Behlen*, 311 F.3d at 1090 (Pet. App. at A5) (citing and quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987)).

district court based upon their belief that Behlen *actually alleged violations of federal securities laws*"[8] – indicate a reliance on general federal-question jurisdiction for the removal rather than § 77p(c).[9] Certainly, it could not be argued that removal jurisdiction for a federal question is established by § 77p(c).

As argued in the Petition, to conclude that removal was available under 28 U.S.C. § 1441 is erroneous – especially in light of 15 U.S.C. § 77v, which was not discussed by the Eleventh Circuit – unless something in 15 U.S.C. § 77p(b) presents a federal question and triggers removal authority. The Petition discussed whether the phrase "be maintained" could imply removal jurisdiction and discussed the then-pending case of *Breuer v. Jim's Concrete of Brevard, Inc.*, which was subsequently decided on May 19, 2003. *Breuer v. Jim's Concrete of Brevard, Inc.*, 123 S. Ct. 1882 (2003). In *Breuer* the Court noted that the "may be maintained" language of the Fair Labor Standards Act ("FLSA") was ambiguous as to "its bearing on removal" and concluded that it did not indicate a bar to removal. *Id.*, at 1884, 1886. The Court did observe that use of the word "maintain" may mean more then "to 'commence' an action" and noted that in the context of the FLSA probably meant "'to continue' to litigate" rather than to "'commence' an action." *Id.* at 1884 & n.1. In the context of 15 U.S.C. § 77p(b), which relates to class actions, the word "maintain" seems to mean more than commencing of an action, given the context of class actions

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[8] *Behlen*, 311 F.3d at 1090 (Pet. App. at A4) (emphasis added).

[9] Additionally, the Defendants' Notice of Removal filed in the district court provided in the opening paragraph that it was filed "pursuant to 28 U.S.C. § 1441(b) and 1446, *et seq.*," – not 15 U.S.C. § 77p(c).

and the use of the word "maintained" in Rule 23 of the Federal Rules of Civil Procedure. *See, e.g.*, Fed. R. Civ. P. 23(b) ("An action may *be maintained* as a class action if the prerequisites of subdivision (a) are satisfied . . .") (emphasis added); Fed. R. Civ. P. 23(c)(1) ("As soon as practicable after the commencement of an action brought as a class action, the court shall determine whether it is to be so *maintained*.") (emphasis added). In any event, in the abstract, the use of the word "maintained" in § 77p(b) carries no particular implication about removal.[10]

The error in characterization of the underlying issue — as inherently federal — bears on the major omission of the Eleventh Circuit's opinion of the SLUSA provision which is the text that provides for removal. By treating the state-court action as one which asserts violations of the federal securities laws, the panel avoids the need to discuss the text of subsection (c) of 15 U.S.C. § 77p, the provision which describes the conditions for removal. Federal-court jurisdiction over this case should be resolved by explicitly addressing the text of § 77p(c), considered in light of the text of the Complaint, in accord with the principles of the decision in *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 122 S. Ct. 1889 (2002).

Also troubling is the provision in 15 U.S.C. § 77v(a) which provides that "[e]xcept as provided in section 77p(c) . . ., no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." In light of this provision,

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[10] Even if the Eleventh Circuit did rely on 15 U.S.C. § 77p(c), and Petitioner does not believe the opinion can be fairly read to do so, the use of the word "maintained" in § 77p(b) is still relevant, because § 77p(c) only makes removable a covered class action "as set forth in subsection (b)."

there is no ground to remove the action without referencing § 77p(c). It therefore seems critical to resolve Behlen's appeal on the basis of § 77p(c), and its explicit text, rather than the complete-preemption doctrine perceived to be implicit in § 77p(b), especially since any doubts regarding removal should be resolved in favor of the Plaintiffs and against removal.

In addition, 15 U.S.C. § 77v highlights the difficulty of grounding the expansive interpretation of SLUSA on the legislative history's concern with the migration of class-action claims into state court. This statute mandates that class actions which allege federal securities law violations (in contrast to state-law violations), if brought in state court, be left there. The mere presence in state court of class allegations was not the problem. Furthermore, there is no SLUSA "removal protection" from the state court allowing class-wide discovery on a federal securities-law class claim.

One might assume that the state court will require, on proper motion, particularized pleading of such a federal securities claim under the Private Securities Litigation and Reform Act ("PSLRA"). However, that same assumption would justify the plain reading of SLUSA that prevents removal or dismissal until the state court has determined that the state action is due to be maintained as a class action. Because SLUSA did not repeal 15 U.S.C. § 77v, there is doubt that SLUSA's text must be construed or implied to authorize removal and dismissal of mere allegations of class-wide wrongdoing based on state law, despite any explicit textual direction to do so. Drawing the inference from the SLUSA language, so as to prevent the possibility that discovery related to class allegations might occur in the state court, is implausible. Plaintiff may choose not to even seek certification of any "SLUSA-type" claim.

A better reading of SLUSA's text is not to assume that the state courts will fail to administer the uniform standards

of SLUSA properly, and not to assume that removal and dismissal are required for mere allegation of class-wide wrongdoing. To base the construction of SLUSA's text on the mere possibility of discovery related to a state-law claim of class-wide wrongdoing assumes purposes to the PSLRA that are not present. Section 101(b) of the PSLRA itself does not bar all discovery.

Considered in this light, the Eleventh Circuit erred in concluding that general federal-question jurisdiction for purposes of removal existed with regard to Behlen's complaint, and Merrill Lynch is incorrect in asserting that there is no basis to conclude that general federal-question jurisdiction was found by the Eleventh Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

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